American Bankers Association
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Brian J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 220549-1090

Re: **Transfer Agent Regulations Concept Release No. 34-76743, File No. S7-27-15**

Dear Mr. Fields:

The American Bankers Association (ABA)[1] is pleased to offer comments on the Transfer Agent Regulations Release (Release) developed by the Securities and Exchange Commission (SEC or Commission). We appreciate the time and effort taken to produce this extensive release documenting the evolution of the transfer agent industry and seeking to modernize transfer agent regulations to reflect the enormous changes in the industry that have taken place since the Commission first adopted the regulations in 1975.

The release comprises both an Advance Notice of Proposed Rulemaking (ANPR), addressing specific areas for which the Commission intends to promulgate rules, as well as a Concept Release seeking input on other issues of concern to the Commission. Our comments on the ANPR and the Concept Release are set forth below in Sections II and III respectively.

I. GUIDING PRINCIPLES

As the Commission recognized in the Release,[2] bank transfer agents must comply not only with the SEC's transfer agent rules,[3] but also with numerous other statutes. For example, in addition to their organic statutes, banking organizations are subject to statutes including the Bank Secrecy Act, Title V of the Gramm-Leach-Bliley Act, the USA Patriot Act, and the Bank Protection Act.

In addition, bank transfer agents are subject to the regulations implementing these statutes as well as additional guidance and examination procedures that further specify bank regulators' expectations for banks pursuant to those statutes. In particular, to the extent transfer agent services are provided under the auspices of the Trust Department, they are also required to comply with regulations applicable to Trust Department activities.[4] The multitude of guidance issued by the federal banking regulators, even if not

[1] The American Bankers Association is the voice of the nation's $16 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $12 trillion in deposits and extend more than $8 trillion in loans. The ABA Corporate Trust Committee comprises bank indenture trustees providing more than 90 percent of the corporate trust services in the U.S. They routinely provide transfer agent and paying agent services for issuers of corporate and municipal debt.

[2] Release at 79-82.

[3] *Id* at 80.

[4] *See,* Office of the Comptroller of the Currency (OCC) *Comptroller's Handbook,* Asset Management Booklets available at http://occ.treas.gov/publications/publications-by-type/comptrollers-handbook/index-comptrollers-handbook.html; Federal Reserve Board (Federal Reserve) Commercial Bank Supervision Manual, Fiduciary

promulgated through the Code of Federal Regulations, has great weight and is enforceable through the bank examination process. Such guidance, which is approved by agency principals, has no limitation similar to that applied to SEC staff guidance.[5]

Belonging to one of the most heavily regulated industries in the country, banks are comprehensively examined for compliance with nearly all of the material requirements that the Commission's ANPR would impose on transfer agents. As discussed more fully below, financial reporting, audits, insurance, safeguarding of customer assets and cyber security are but a few of such areas.

As a preface to our specific responses to the issues raised in the Release, ABA offers the following guiding principles that we believe should inform the Commission's deliberations in formulating any revisions to existing regulations or developing new regulations that would apply to bank transfer agents.

1. The Commission should exempt bank transfer agents from rules that conflict with or duplicate existing rules of the federal banking agencies. Banks are examined annually for compliance with applicable statutory and regulatory requirements and the largest institutions have resident examiners year round. In addition, bank transfer agents that also serve as paying agents for securities that are held in book-entry form must comply with the various rules of the Depository Trust and Clearing Corporation (DTCC) and its subsidiaries. Therefore, any new rules affecting bank paying agents must also not conflict with DTCC rules with which they must comply.

   Although, as discussed below, many of our responses reflect concerns of bank transfer agents that service debt securities, all banks – no matter what type of transfer agent services they provide – are subject to the statutes, regulations and guidance cited in this letter. Thus, all bank transfer agents should be able to avail themselves of bank exemptions established to avoid conflicting or duplicative transfer agent regulations.

2. The model of broker-dealer regulation is not appropriate for heavily-regulated banking organizations that are already subject to comprehensive regulation in the areas in which the Commission contemplates rulemaking, are structured in a fundamentally different manner, and are required to hold far more capital than broker-dealers.

3. We urge that the Commission, in proposing new or revised transfer agent regulations:

   a. Identify with specificity the risks to issuers and securityholders from inadequate regulations or the lack of regulations;
   b. Demonstrate that the proposed changes are tailored narrowly to address those specific risks; and
   c. Establish through appropriate analysis that the benefit to issuers or securityholders of the proposal outweighs the costs to transfer agents.

Activities Section 4200 available at http://www.federalreserve.gov/boarddocs/supmanual/cbem/4000.pdf; and Federal Deposit Insurance Corporation (FDIC) *Trust Examination Manual*, available at https://fdic.gov/regulations/examinations/trustmanual/.

[5] *See, e.g.,* Staff Guidance on Current SCI Industry Standards November 19, 2014 available at http://www.sec.gov/rules/final/2014/staff-guidance-current-sci-industry-standards.pdf. "The statements in this staff guidance were prepared by and represent the views of the staff. They are not rules, regulations, or statements of the Securities and Exchange Commission ("Commission"). Further, the Commission has neither approved nor disapproved this staff guidance."

II. RESPONSES TO ISSUES RAISED IN THE ANPR

ABA's comments on the Advance Notice of Proposed Rulemaking particularly represent the concerns of the members of ABA's Corporate Trust Committee, who exclusively provide transfer agent services with respect to debt securities. Because the Committee members service only debt, we offer no comments with respect to servicing equity securities.

Our members provide transfer agent services in conjunction with their primary services as indenture trustees.[6] As such, there is generally no separate delineation of fees for transfer agent services (typically called "registrar" services) because they are ancillary to the business of serving as indenture trustee. The consensus among our bank transfer agent members is that along with the safety and soundness regulations under which these banks operate, the current transfer agent rules provide an efficient and effective framework to offer services both to issuers and their debt securityholders.

In the ANPR, the Commission has posed numerous questions in the following areas in which it intends to propose new or amended rules:

1. Expanding the scope of information collected by Forms TA-1 and TA-2 and requiring an electronic format;
2. Requiring a written agreement with issuers including the services to be provided, the fee schedule, and requirements for the handing over of transfer agent records to the successor transfer agent;
3. Enhancing requirements for safeguarding of issuer and securityholder funds and securities;
4. Requiring transfer agents to establish business continuity and disaster recovery plans;
5. Requiring transfer agents to establish basic procedures regarding the use of information technology, including methods of safeguarding personally identifiable information; and
6. Conforming and updating various terms and definitions to reflect modern systems and usage.

A. REGISTRATION AND ANNUAL REPORTING REQUIREMENTS – FORMS TA-1 AND TA-2

In seeking comment on possible amendments to Forms TA-1 and TA-2, the Commission stated that the information provided on these forms serves "the vital regulatory goals of informing the Commission's oversight and examination programs and informing the public about the nature and scope of transfer agents' activities.[7]

[6] Indenture trustees provide transfer agent services pursuant to an indenture or similar document that governs the bond issuance with the issuer. Their duties are ministerial in nature and are, in the absence of an "event of default" under the governing documents, limited to those responsibilities specified in therein. They typically exercise little or no discretion before an "event of default." Such contracts generally have lengthy terms; and trustees are chosen for, among other things, their ability safely and efficiently to handle disbursements pursuant to the contract, including the payment of interest to securityholders.

[7] Release at 111.

Specifically, Forms TA-1 and TA-2 are used to:

1. Help regulators, issuers, investors, and other interested parties determine whether a transfer agent is and will continue to be able to perform its functions properly;
2. Help regulators, issuers, investors, and other interested parties determine the nature of the business conducted by a particular transfer agent;
3. Permit the Commission to target effectively its transfer agent inspection program, including assisting examiners in preparing for and conducting transfer agent examinations;
4. Monitor transfer agent activity generally;
5. Enable Commission staff to evaluate particular burdens and benefits that would be placed on the industry in potential rulemaking endeavors; and
6. Assist the Commission and Commission staff in assuring that rules are properly focused and refined.[8]

To ensure that these forms continue to serve "vital regulatory goals," the Commission intends to propose amendments to the forms to include: (1) disclosure requirements with respect to certain financial information, such as statements of financial condition, income, and cash flows; (2) all direct or indirect conflicts of interest; (3) the issuers and securities for which a transfer agent is providing transfer agent and other services; and (4) the specific services being provided or expected to be provided for each issuer or security, regardless of the nature of those services.[9] The Commission further stated that "[t]hese anticipated amendments are intended to facilitate disclosure that is more closely targeted at risks associated with contemporary transfer agent activities."[10]

1. FINANCIAL DISCLOSURES

The Commission asserts that the various financial reports cited above are necessary to achieve its "vital regulatory goals." To the extent that the relevant goal is to enable *investors and other interested parties* to determine whether a transfer agent is and will continue to be able to perform its functions properly, there is a wealth of financial data on bank transfer agents that is publically available.

Specifically, bank transfer agents are required pursuant to the Federal Deposit Insurance Act[11] to file quarterly Reports of Condition and Income (Call Reports) with the FDIC. Call report data are a public and widely used source of timely and accurate financial data regarding a bank's condition and the results of its operations. According to the FDIC, the agency is fully responsible for maintaining an accurate and up-to-date Call Report data base readily available to all users, including the general public. Simply by providing a link to their Call Reports, bank transfer agents would provide the Commission, issuers and securityholders with ready access to financial information that will enable them to determine whether a bank transfer agent is and will continue to be able to perform its functions properly.

However, to the extent the Commission seeks stand-alone financial reports of the transfer agent function, ABA has grave concerns. Transfer agent services are typically a very small part of the overall products and services provided by banking organizations and, as a result, such stand-alone financial reports are not prepared. Our members believe that providing financial statements solely for the transfer agent function would be extremely costly and of questionable value to issuers and securityholders. Nor have issuers

[8] *Id.*
[9] *Id.*
[10] *Id.* The Commission also asked whether it should end the current practice of having TA-1 become effective automatically after 30 days. The consensus of our members is that no change is needed to the automatic approval process.
[11] *See*, 12 U.S.C. §1817(a)(1).

requested such stand-alone financial statements from bank transfer agents. ABA believes that issuers would likely take far more comfort from the overall financial strength of the banking organization as a whole and the fact that it is examined frequently, than the small window into the organization afforded by financial information about the transfer agent function.

Moreover, the Release provides no information or supporting evidence of the risks associated with contemporary transfer agent activities that would be addressed by additional financial disclosures. Accordingly, before proposing a requirement for public disclosure of financial information about the transfer agent function, it is incumbent on the Commission to justify with compelling evidence the need for such disclosure, and concretely demonstrate that the value of this information to issuers and securityholders substantially outweighs the costs to transfer agents of providing it.

Separately, the Commission intends to propose new rules for transfer agents similar to those recently adopted for broker-dealers concerning amended annual reporting and independent audits "which are designed to, among other things, increase broker-dealers' focus on compliance and internal controls."[12] First, we reiterate our belief that the model of broker-dealer regulation is not appropriate for heavily regulated banking organizations that are already subject to comprehensive regulation in these areas, are structured in a fundamentally different manner and are required to hold far more capital than broker-dealers.

Second, and more critically, bank transfer agents need absolutely no impetus to increase their attention to compliance and internal controls because they are already subject to internal control requirements under banking law. Specifically, Section 39 of the Federal Deposit Insurance Act requires the federal banking agencies to establish safety and soundness standards. Included in these standards is a requirement that an insured institution have internal audit systems appropriate to the size of the institution and the scope and nature of its activities.[13] Banks are examined for compliance with these standards at least every 12 months, and large banks have resident examiners who monitor their activities on an ongoing basis.

In addition, banks, thrifts and holding companies with $500 million or more in total assets are subject to FDIC's regulations at 12 CFR Part 363 that establish requirements for independent financial statement audits; timing, contents, and types of management and auditor reporting; and the board of director's audit committee structure and responsibilities. Public accountants engaged by institutions subject to Part 363 must adhere to AICPA and SEC independence rules.
Given that bank transfer agents are already subject to numerous internal controls and independent audit requirements, there is significant possibility for duplicative and/or conflicting regulations. Therefore, the Commission should not impose on bank transfer agents any requirements for internal controls or independent audits.

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[12] Release at 124.

[13] 12 U.S.C § 1831p-1. The internal controls and information system must include: 1) An organizational structure that establishes clear lines of authority and responsibility for monitoring adherence to established policies; 2) Effective risk assessment; (3) Timely and accurate financial, operational and regulatory reports; (4) Adequate procedures to safeguard and manage assets; and (5) Compliance with applicable laws and regulations. *See*, 12 CFR Part 364 Appendix A. Part 364 is applicable to national banks as well as state member and non-member banks**.** Banks' compliance with regulatory guidance concerning their internal controls is subject to extensive examination by the applicable federal regulators. OCC, for example, has published numerous examination booklets on the topic, including the *Comptroller's Handbook for Large Bank Supervision*, available at: http://www.occ.treas.gov/publications/publications-by-type/comptrollers-handbook/pub-ch-ep-lbs.pdf.

2. DISCLOSURE OF DIRECT AND INDIRECT CONFLICTS OF INTEREST

The Commission seeks comment on an anticipated amendment to Forms TA-1 and TA-2 to require transfer agents to disclose all direct and indirect conflicts of interest. However, the Release lacks any supporting information demonstrating how such a disclosure would allow the agency to target "risks associated with contemporary transfer agent activities."[14] ABA strongly opposes such a requirement absent a fulsome discussion of the specific need for such a disclosure and the risk it is intended to ameliorate. A broad requirement to disclose "all direct and indirect" conflicts of interest is unacceptably vague. Therefore, before going forward with such an amendment, the Commission should provide clear guidance on its views as to what constitutes a conflict of interest as well as a materiality standard to narrow appropriately the scope of any such requirement to the identified risk.

We note that national banks that provide services, including transfer agent activities, under the auspices of their Trust Departments are subject to requirements established in the *Comptroller's Handbook for Conflicts of Interest*.[15]

The Commission has asked whether a conflict arises when a transfer agent accepts securities as payment for its services. ABA is not aware of any instances in which bank transfer agents accept securities as payment for transfer agent services.

The Commission has also raised the issue of whether conflicts arise in the context of transfer agent affiliations with issuers or broker-dealers. Banks provide transfer agent services in an agency capacity in arms-length transactions that are negotiated with issuers. To the extent that the bank is affiliated with an issuer or broker-dealer, the transaction is subject to the affiliate restrictions of Sections 23A and 23B of the Federal Reserve Act,[16] an area that receives robust scrutiny in examinations by the federal bank regulators. Section 23B requires that transactions with affiliates be conducted on an arms-length basis. Accordingly, we believe the statutory restrictions and bank regulatory examination regime mitigate any concerns about bank affiliations with issuers or broker-dealers.

3. DISCLOSURE OF TRANSFER AGENT FEES

The Commission has asked whether transfer agents' fees should be disclosed on Forms TA-1 and TA-2 in a standardized framework for comparison purposes. ABA strongly objects to any requirement to disclose transfer agent fees on Forms TA-1 and/or TA-2, whether or not in a standardized framework. First and foremost, disclosure on either form would make available to the broader marketplace (including a transfer agent's competitors) very sensitive proprietary information. Moreover, with respect to indenture trustees, the fees are based on a package of services that is negotiated with an issuer. Thus, an "apples-to-apples" comparison would be impossible and could lead to significant competitive disparities should a package of bundled services be compared to a single service.

Importantly, we note that other SEC registrants are not required to disclose a fee schedule on their registration forms, which raises the question of why the SEC seeks to have transfer agents do so. Given that a comparison of fees would be inherently flawed, we question the value of such disclosures to issuers or to the Commission, especially given that the fee information is generally available to the Commission through the existing recordkeeping requirements of Rule 17Ad-6(8).

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[14] Release at 111.

[15] Comptroller's Handbook for Conflicts of Interest available at http://occ.treas.gov/publications/publications-by-type/comptrollers-handbook/custodyservice.pdf.

[16] 12 U.S.C. §§ 371c and 371c-1 respectively, implemented by Federal Reserve Regulation W, 12 CFR Part 223.

To the extent that transfer agents do *not* have written contracts with issuers, if the Commission ultimately requires contracts with issuers to be in writing, the fees would be set forth therein. ABA believes that written contracts would mitigate any concerns that issuers lack such information.

Accordingly, we reiterate our strong opposition to any requirement to disclose transfer agent fees.

4. DISCLOSURE OF TRANSFER AGENTS' ISSUER CLIENTS

The Commission seeks comment on anticipated amendments to Forms TA-1 and TA-2 to require transfer agents to disclose the issuers and securities for which a transfer agent is providing transfer agent and other services, and the specific services being provided or expected to be provided for each issuer or security, regardless of the nature of those services. Again, the Release lacks any supporting information demonstrating how such a disclosure would allow the agency to target "risks associated with contemporary transfer agent activities." Indeed, we are not aware of any risks that would be ameliorated by disclosure of issuer clients or any benefits to issuers or investors of such disclosure. We note further that the Commission has access to this information through the recordkeeping requirements of Rule 17Ad-6.

Accordingly, ABA strongly opposes any requirement to disclose the issuers to whom the bank provides transfer agent services as well as the types of services provided. It would be wholly inappropriate for banks to disclose the names of their clients – that is the prerogative of the issuer clients themselves. Indeed, such a requirement would be akin to asking banks to disclose all the customers who have deposit accounts in their institutions. We also strongly oppose any additional requirement to disclose the types of services provided – information about a transfer agent's primary products and services is already presented on Form TA-2, which is publicly available.

5. REQUIREMENT TO FILE MATERIAL CONTRACTS.

The Commission has asked whether, to increase its ability to monitor trends and address emerging regulatory issues, it should require transfer agents to file as exhibits to Form TA-2 material contracts related to transfer agent services. ABA opposes any such anticipated amendment. Again, the Release lacks supporting information demonstrating that the need for this requirement outweighs the very significant costs and burdens of providing it. This information is readily available to the Commission – Rule 17AD-6(a)(8) requires transfer agents to maintain copies of *all* contracts regardless of materiality. Further, we note that in the case of municipal debt, material contracts are described in the indenture and are already public documents. Similarly, issuers of public debt (through their appointed underwriters) publically file prospectus information (on Form S-1) that substantially conforms to "material contracts."

Importantly, because banks provide transfer agent services as part of their commercial banking operations, material contracts could include subjects as diverse and comprehensive as data providers, data security, physical security, insurance, legal services, accountants, and a host of consultants. If the concern the Commission seeks to address involves the due diligence in selecting third-party vendors, bank transfer agents are already subject to strict federal and state bank regulatory requirements and examination[17] with respect to selection, use, and monitoring of third party service providers.[18] Thus, any emerging regulatory issues will be addressed through the examination process, making disclosure both unnecessary and duplicative. Accordingly, ABA urges the Commission not to move forward with such a requirement.

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[17] OCC Bulletin 2013-29; Federal Reserve Board SR 13-19; FDIC Financial Institution Letter, Guidance for Managing Third-Party Risk, available at https://www.fdic.gov/news/news/financial/2008/fil08044a.html.

[18] Moreover, with respect to key third-party service providers, the federal banking agencies have statutory authority to examine and monitor these providers. *See,* 12 U.S.C. § 1464(d)(7).

B. WRITTEN AGREEMENTS BETWEEN TRANSFER AGENTS AND ISSUERS

The Commission intends to propose amendments to the transfer agent rules to require that any arrangement for transfer agent services between a registered transfer agent and an issuer be set forth in a written agreement that, among other things, specifies the services to be provided, fees to be imposed, particularly any termination fees, and requirements for the turnover of transfer agent records to the successor transfer agent. The Commission has expressed its concern that undocumented or under-documented arrangements may lead to protracted disputes, especially with respect to fees and termination of the arrangement.

ABA supports this recommendation with certain caveats. Bank transfer agents already have written contracts with issuers for transactions that include, among other things, the provision of transfer agent services. For example, with respect to the issuance of asset-backed, corporate and municipal bonds, such transfer agent services are part of a package of services provided to issuer clients in the transaction and are set out in an indenture (or a similar governing document) or in a separate fee letter or contract. However, as discussed above, the pricing in the contract is based on the package of services, and the transfer agent services are not priced separately.

Provisions for termination of the services of a transfer agent are part of the written contract with the issuer, including indemnities payable and "out-of-pocket" fees the transfer agent may incur from third parties providing data to their successor that are passed on to the issuer. The issuer would agree to such fees as part of the contract, although the exact amount of "out-of-pocket" fees may not be known at the time the contract is signed. Thus, through the contract, and any previous negotiations with respect to the transaction, issuers are well aware of the fees they are paying for the package of services. Accordingly, ABA believes that the types of contracts bank transfer agents have with issuers clearly address the concerns of the Commission, and that the agency should refrain from imposing on bank transfer agents any requirements that would conflict with current practices.

C. SAFEGUARDING FUNDS AND SECURITIES

In the ANPR, the Commission has broadly enumerated potential risks from activities it describes as "paying agent" services, *i.e.*, custody of funds or securities from issuers or securityholders, distribution of cash and stock dividends, bond principal and interests, mutual fund redemptions, and other payments to securityholders.[19] These concerns do not arise of late; rather they were the impetus for the adoption in 1983 of Rule 17Ad-12 which requires transfer agents to assure that funds and securities in their possession or control "are held in safekeeping and are handled, in light of all facts and circumstances, in a manner reasonably free from risk of theft, loss or destruction."[20] The Commission asserts that more specific and robust rules for paying agents "may be necessary" for investor protection, to facilitate the prompt and accurate clearance and settlement of securities transactions, and keep pace with the evolving roles transfer agents assume.[21] As we respond to the specific issues raised in this section, we reiterate our objection to any anticipated amendments to the transfer agent regulations that would conflict with or duplicate existing bank regulatory requirements with which bank transfer agents must comply. Similarly, because bank paying agents must comply with the regulations of DTCC with respect to book-entry securities settled at DTCC, conflicts with DTCC rules should also be avoided.

[19] Release at 119-122.
[20] Exchange Act Rule 17Ad-12.
[21] Release at 123.

1. MINIMUM BEST PRACTICES FOR SAFEGUARDING

To address a perceived need for specific and robust rules that "may be necessary," the Commission has stated that it intends either to propose new rules or amend Rule 17Ad-12 to require transfer agents to comply with specific minimum best practices requirements related to safeguarding funds and securities, including:

1. Maintaining secure vaults;
2. Installing theft and fire alarms;
3. Developing specific written procedures for access and control over securityholder accounts and information;
4. Enhanced recordkeeping requirements;
5. Specific unclaimed property procedures; and
6. Segregation of client funds.

ABA is not aware of any situation that would warrant a departure from the principles-based concept underlying Rule 17Ad-12 (facts and circumstances) to a "one-size-fits all" proposal specifying safeguarding practices. Nor does the Release indicate the concerns that would cause the Commission to undertake such a revision. Rather, under the current rule the Commission has authority to remedy any violations of the rule no matter the cause of the violation. Absent additional justification concerning the need for a change, ABA believes that Rule 17Ad-12 offers sufficient protection for issuers and investors.

Banks have long employed the types of safeguards that the Commission has enumerated. As described below, bank transfer agents must have policies and procedures for safeguarding of assets and internal controls for and audits of bank operations. With respect to physical security, bank transfer agents are subject to section 3 of the Bank Protection Act,[22] which requires banks to designate a security officer who must establish a security program, including security devices (such as vaults). As discussed in Section A.1 above, banks also must have robust internal control and audit programs pursuant to Section 39 of the Federal Deposit Insurance Corporation Act.[23]

In addition, banks typically operate their transfer agent business under the auspices of their Trust Departments. Under the regulations of the OCC, the Federal Reserve and FDIC, banks are required to comply with safeguarding procedures that include operational controls such as segregation of duties, dual control of all types of assets, and independent control processes for records and accounting systems, including reconcilement of cash and asset movements.[24]

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[22] 12 U.S.C. § 1882, implemented through regulations at 12 CFR Part 21, Subpart A (national banks), 12 CFR 208.61 (state member banks), and 12 CFR Part 326 Subpart A (state nonmember banks).

[23] 12 U.S.C. § 1831p-1.

[24] OCC's regulation of fiduciary activities at 12 CFR Part 9 is considered the "gold standard" by bank regulators across the country, and serves as the model for state bank regulators. See *e.g.*, *Comptroller's Handbook for Asset Management* (Operational Controls),; *Comptroller's Handbook for Custody Services* (Operational Controls); FDIC *Trust Examination Manual for Transfer Agents* (Section 11, Internal Controls); Federal Reserve Board Commercial Bank Supervision Manual, Fiduciary Activities Section 4200.

In addition to bank regulators' asset management requirements, the *Interagency Guidelines Establishing Information Security Standards*, Appendix B, requires banks to consider adopting, among other things, appropriate security measures that may include:

> "a. Access controls on customer information systems, including controls to authenticate and permit access only to authorized individuals and controls to prevent employees from providing customer information to unauthorized individuals who may seek to obtain this information through fraudulent means;
>
> "b. Access restrictions at physical locations containing customer information . . . to permit access only to authorized individuals;
>
> "c. Encryption of electronic customer information, including while in transit or in storage on networks or systems . . .;
>
> "e. Dual control procedures, segregation of duties, and employee background checks for employees with responsibilities for or access to customer information; and law enforcement agencies; . . . and
>
> "h. Measures to protect against destruction, loss, or damage of customer information due to potential environmental hazards, such as fire and water damage or technological failures . . . "[25]

Importantly, the *Interagency Guidelines* "afford the FFIEC agencies ***enforcement options*** if financial institutions do not establish and maintain adequate information security programs."[26] [Emphasis added.]

Given that banks are already examined annually for compliance with banking requirements addressing such issues and that the largest institutions have resident examiners throughout the year, the potential for the proposed changes to impose conflicting or duplicative requirements is significant. Accordingly, the Commission should provide an exemption for bank transfer agents from any safeguarding requirements it may propose.

a. INDEPENDENT PUBLIC ACCOUNTANT AUDITS OF COMPLIANCE AND INTERNAL CONTROLS

The Commission has asked whether it should require transfer agents to file reports of an independent public accountant on the transfer agent's compliance and internal controls. Yet the Release does not identify risks that would be addressed by such independent accountant audits. Therefore, ABA objects to a requirement for independent public accountant audits without compelling evidence that the benefits to the agency, issuers and securityholders outweigh the very significant costs that would be borne by bank transfer agents.

As noted above, bank transfer agents are already subject to comprehensive internal controls requirements under banking law. Specifically, Section 39 of the Federal Deposit Insurance Corporation Act requires the federal banking agencies to establish safety and soundness standards. Included in these standards is a requirement that an insured institution establish internal audit systems appropriate to the size of the

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[25] *See* 12 C.F.R. Part 30, app. B (OCC); 12 C.F.R. Part 208, app. D-2 and Part 225, app. F (Board); and 12 C.F.R. Part 364, app. B (FDIC).

[26] *See*, FFIEC IT Examination Handbook, Information Security, page 1 (July 2006) available at: http://ithandbook.ffiec.gov/ITBooklets/FFIEC_ITBooklet_InformationSecurity.pdf.

institution and the scope and nature of its activities.[27] Banks are examined for compliance with these standards annually, and large banks have in-house examiners who monitor their activities on an ongoing basis.

Banks that provide transfer agent services with respect to structured finance transactions are required by SEC Regulation AB to provide such independent accountant reports, an exercise which they have found to be extremely expensive. Banks also often hire accounting firms to produce SSAE 16 reports (formerly SAS 70 reports) and similar reports which attest to their controls.[28]

Accordingly, absent a compelling justification by the Commission that the need for such reports more than outweighs their costs, ABA believes that such independent public accountant reviews are unwarranted.

b. REQUIREMENTS FOR PAYING AGENT, CUSTODY SERVICES

The Commission has asked whether they should require transfer agents to file reports disclosing how they maintain custody of issuer and securityholder funds and securities similar to the information broker-dealers are required to report quarterly or, in the alternative, whether they should provide specific guidelines or requirements for paying agent and custody services. Again, we reiterate our belief that the model of broker-dealer regulation is not appropriate for heavily regulated banking organizations that are already subject to comprehensive regulation in these areas, are structured in a fundamentally different manner and are required to hold far more capital than do broker-dealers.

As institutions whose fundamental purpose is to hold funds and assets for all types of customers, ABA believes there is no need for an additional overlay of regulation by the Commission on the traditional activities of bank transfer agents. Moreover, the fact that transfer agent services are conducted under the auspices of the Trust Department with its strict controls environment provides an additional layer of protection for both issuers and investors. Therefore, the Commission should not impose such a requirement on bank transfer agents.

c. SEGREGATION OF BANK DEPOSIT ACCOUNTS

The Commission has raised concerns about bank transfer agents holding issuer or securityholder funds in their own banks. Holding funds on behalf of others, whether in a trust capacity, or as custodians or escrow agents is a routine part of the banking business, and one for which federal and state bank regulators require policies and procedures, reconciliation, and audit requirements, to name but a few. Therefore, ABA believes that funds held in deposit accounts, whether in the transfer agent's own bank, an affiliated bank, or an unaffiliated bank can be safely and accurately segregated such that in the event of a bank failure the funds held on behalf of issuer clients or their shareholders are not treated as funds of the transfer agent.

Deposit accounts are required to be titled to reflect that the funds are held on behalf of the issuer or shareholders and bank records must reflect this capacity so that, in the event of a bank default, FDIC will look through to the beneficial owners of the accounts and insure the accounts up to the beneficial owner's

[27] 12 U.S.C. § 1831p-1. *See infra* note 12.

[28] We note that Rule 17Ad-13 offers an alternative to avoid the cost and burden of compiling duplicate reports. Specifically, Rule 17 Ad-13(a) requires that the annual accountant's report addresses "procedures for safeguarding of related securities and funds." However, if a similar report is prepared for the bank transfer agent's board of directors or audit committee, Rule 17Ad-13(d)(3) affords an exemption to the bank from the need for a separate report.

deposit insurance limits.[29] Moreover, with respect to securities held on the books of the bank's Trust Department, such securities never become assets of the bank, either before or after a default**.**

The Commission has suggested the possible use of "special" deposit accounts which do not become part of the assets of the bank. We believe it is unlikely that banks would be willing to offer such accounts, given the uncertainty of the requirements that would satisfy the FDIC. Moreover, we believe that FDIC disfavors such accounts because of their impact on resolutions.

Moreover, ABA believes that requiring bank paying agents to hold funds in an unaffiliated bank could raise operational challenges to the extent that the transfer agent bank must wait for the unaffiliated bank to provide access to the transfer agent's funds. This is certainly the case with bank indenture trustees that provide transfer agent services, and who have long held large sums in their own banks without incident in their capacity as paying agents.[30] Furthermore, using unaffiliated banks would increase operational costs which would ultimately be borne by the transfer agent's clients.

d. TRANSFER AGENT INSURANCE REQUIREMENTS

In the ANPR, the Commission raises a number of questions about the extent to which transfer agents have insurance. Bank transfer agents are expected to have robust insurance coverage to address all types of risks.[31] As a result of federal and state bank supervisory requirements, bank transfer agents are well insured, typically at the bank level. Moreover, federal and state bank regulators, as part of their safety and soundness examinations, evaluate the amount of insurance a bank has based on bank size and the activities in which the bank is engaged. There is also a group of larger banks that participate in an annual peer benchmarking survey to assess whether they are adequately insured, with the aggregate results sent to the participants.

We note that many banks self-insure their risks with the additional overlay of an outside insurance policy, a practice that ABA believes should remain unaffected by any anticipated Commission amendments. Rather, because banks must already satisfy robust insurance requirements, the Commission should exempt bank transfer agents from any insurance requirements it may propose.

e. STATE ESCHEATMENT REQUIREMENTS

The Commission has requested information on best practices with respect to funds awaiting escheatment as well as whether transfer agents should disclose information about such funds. First, as the Commission acknowledges, this is an area governed by the laws of 50 different states, which should serve as a caution to the SEC regarding considerations to regulate in this arena.

Bank transfer agents comply with state laws governing escheatment requirements in those jurisdictions in which they operate. To the extent state law requires disclosure of information pertaining to residual or

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[29] *See* 12 CFR §§ 330.5, 330.7.

[30] Because of applicable cost structures, corporate trust engagements are typically large transactions involving multi-million dollar, or sometimes multi-billion dollar, financings. The administrative and operational requirements of the corporate trustee's performance, including administration of any associated trust and agency accounts, are often detailed and complex, requiring compliance with strict timeframes, and sometimes including responsibility for detailed investor reporting and data analytics.

[31] *See, e.g. Comptrollers Handbook, Risk Management and Insurance*, available at http://occ.treas.gov/publications/publications-by-type/comptrollers-handbook/insurance1.pdf.

unclaimed funds, banks make the appropriate disclosures. With respect to disclosure, bank transfer agents report cash awaiting escheatment on Line 6 of their quarterly Call Reports.

Given the diverse nature of state requirements, the Commission should refrain from regulating in this area other than to request disclosure of the amount of cash awaiting escheatment.

f. FORMER PAYING AGENTS

The Commission seeks input about paying agents' knowledge of transfer agents who no longer provide paying agent services with respect to a particular issuer. Bank paying agents generally would engage in some due diligence to determine who the new paying agent is, typically by looking at DTCC's system. For example, bank transfer agents typically use a number of different sources to identify the current transfer agent, including:

1. Financial Information Incorporated (FII), which is a separate agent website.
2. National Information Center (NIC), which is public website through the Federal Reserve System under the Federal Financial Institutions Examination Council.
3. DTCC, through Participant Terminal System (PTS), used to look up transfer and paying agent information.

Some bank transfer agents may also include a disclaimer that the bank has done a review and believes the new agent is "X," but does not know that to a certainty.

D. RESTRICTED SECURITIES AND COMPLIANCE WITH FEDERAL SECURITIES LAWS

The Commission has raised numerous questions in this section about possible amendments to its rules, including issues relating to the removal of restrictive legends and whether to require transfer agents to:

1. Designate a Chief Compliance Officer, and have written compliance and supervisory policies and procedures;
2. Conduct background checks of employees, including possible registration of employees with the SEC; and
3. Conduct due diligence on issuers and securityholders.

1. REMOVAL OF RESTRICTIVE LEGENDS

In the ANPR, the Commission has expressed its concerns with respect to the removal of restrictive legends on securities. In particular, the Commission requested input on whether it should provide specific guidelines and requirements for transfer agents in connection with removing a restrictive legend and in connection with issuing any security without a restrictive legend, such as:

1. Obtaining an attorney opinion letter;
2. Obtaining approval of the issuer;
3. Requiring evidence of an applicable registration statement or evidence of an exemption; and/or
4. Conducting some level of minimum due diligence (with respect to the issuer of the securities, the shareholder and/or the attorney providing a legal opinion).

Because bank transfer agents *do not* remove restrictive legends *unless* they receive a legal opinion from the issuer's counsel that the removal is authorized, it is imperative that bank transfer agents be permitted to continue relying on legal opinions.

That said, ABA has significant concerns that any new due diligence rules would create obligations for transfer agents to conduct certain factual investigations, analyze the results of those investigations and presumably make discretionary decisions based on the results of those investigations. If the Commission were to adopt the requirements enumerated in many of the questions in Section D, the existing role of a transfer agent would be fundamentally changed from a purely ministerial role to that of a gatekeeper with wide-ranging duties aimed at preventing securities fraud. Our concerns include the following:

1. Transfer agents typically have no authority to conduct the types of inquiries contemplated by many of the Commission's questions.
2. Even if authority were somehow to be given to transfer agents, much of the information contemplated by many of these questions would not be realistically attainable.
3. The investigative obligations contemplated by many of the questions will likely involve significant costs and transactional delays which could ultimately impact the effective functioning of the national clearance and settlement system.
4. Once this information is obtained, if any judgment calls are required, who would make those calls? Transfer agents are not equipped to do so and would not likely agree to accept such a duty.

ABA cautions the SEC not to disrupt the existing framework of accepted transfer agent duties without significant consideration of other remedies that would address the Commission's concerns. We believe that bank transfer agents should be entitled to rely on a legal opinion from the issuer's counsel (which would obviously have the approval of the issuer) and that obtaining the opinion should suffice for due diligence.

2. OWNERSHIP HISTORY

The Commission has requested input on whether transfer agents currently possess detailed and accurate information regarding the ownership history of the securities they process. Bank transfer agents would *not* know the ownership history of a security unless they have a registered holder. Even then, bank transfer agents would not need to know a security's ownership history to provide transfer agent services with respect to the security. With respect to book-entry securities, the only party they know is DTCC.

We note also that bank transfer agents follow STA guidelines with respect to such actions, and typically it is the broker-dealer who provides to the bank the information on ownership necessary to facilitate a transaction.

3. CUSTOMER DUE DILIGENCE

Banks are required to adopt Customer Identification Programs pursuant to section 326 of the USA PATRIOT Act of 2001. Therefore, banks are subject to "know your customer" rules, although compliance with such requirements may not be conducted within the transfer agent department but rather through a department of the bank specifically tasked with ensuring compliance with the KYC rules.[32] As

[32] On May 9, 2003, OCC, the Federal Reserve, FDIC, the Financial Crimes Enforcement Network, the Treasury Department and other agencies published a joint final rule, 31 CFR §103.121, entitled "Customer Identification Programs for banks, savings associations, credit unions and certain non-federally regulated banks at 68 *Fed. Reg*. 25090. The final rule implemented section 326 of the USA PATRIOT Act of 2001 and requires banks, savings associations, credit unions, and certain non-federally regulated banks to have a customer identification program.

with all other bank regulatory requirements, banks are robustly examined for compliance with KYC requirements. Accordingly, the Commission should not move forward with a KYC proposal that does not exempt banks, thereby avoiding potentially conflicting and duplicative requirements.

ABA objects to a requirement to conduct due diligence on an issuer's securityholders. As noted previously, because the vast majority of securities are held at DTCC, the only securityholder known to the transfer agent is DTCC, rendering any due diligence for such securities impossible by the transfer agent. Rather that customer due diligence is already performed by the custodian bank or broker dealer through which the shareholder holds its interest in the security.[33] Moreover, conducting due diligence on registered holders would be prohibitively expensive to undertake if at all possible; nor is such a requirement contemplated as part of the current ministerial responsibilities of transfer agents.

4. POLICIES AND PROCEDURES, DESIGNATION OF CHIEF COMPLIANCE OFFICER

The Commission has asked whether it should require transfer agents to maintain, implement and enforce written compliance and/or supervisory policies and procedures similar to those required of broker-dealers. ABA objects to any amendment that would impose such a duplicative requirement on bank transfer agents.

Bank transfer agents already have such policies and procedures and are regularly examined by federal and state bank regulators for compliance with them. Accordingly, there is a significant potential for duplication in the case of any such requirement promulgated by the Commission. And, as we have stated above, we believe that the model of broker-dealer regulation is not appropriate for heavily regulated banking organizations that are already subject to comprehensive regulation in these areas, and that are structured in a fundamentally different manner.

With respect to designating a "Chief Compliance Officer," bank transfer agent operations are conducted within the bank itself, typically under the auspices of the bank's Trust Department. As a result, there already exists a structure to ensure compliance with all of the Trust Department's policies and procedures, including transfer agent activities. Moreover, banks typically have an officer, title irrespective, who is responsible for compliance with all applicable laws and regulations, including transfer agent rules.

As noted previously, banks are examined for compliance with their policies and procedures, and the larger bank transfer agents have resident examiners. Accordingly, the Commission should exempt bank transfer agents from any requirement to designate a "Chief Compliance Officer" specifically for transfer agent activities.

5. BACKGROUND SCREENING

The Commission has asked whether it should require transfer agents to conduct security screenings of their employees. Pursuant to Section 19 of the Federal Deposit Insurance Act,[34] banks are prohibited from hiring any person who has been convicted of any criminal offense involving dishonesty or a breach of trust or money laundering, or who has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense. "Section 19 imposes a duty upon the insured institution to make a reasonable inquiry regarding an applicant's history, which consists of taking steps appropriate under the circumstances, consistent with applicable law, to avoid hiring or permitting participation in its

[33] 31 CFR § 1020.220 for banks; 31 CFR § 1023.2020 for broker-dealers.
[34] 12 U.S.C. § 1829.

affairs by a person who has a conviction or program entry for a covered offense."[35] As a result, banks conduct robust background screening of employees, and are examined by federal and state bank regulators for compliance with Section 19. With respect to third-party service providers, as noted earlier banks are subject to stringent vendor management requirements imposed by the federal bank regulators.[36]

Accordingly, to avoid duplicative and potentially conflicting requirements, the Commission should exempt bank transfer agents from any SEC-imposed requirements for background screening.

a. REGISTRATION OF EMPLOYEES

In addition, the Commission has asked whether certain transfer agent employees should be required to register with the agency. We fail to see what aspect of transfer agents' activities – which are largely ministerial in nature – would warrant registration with the Commission and the attendant structure that would be necessary to administer it. Accordingly, absent a compelling rationale that would outweigh the significant initial and ongoing costs of establishing and maintaining such a structure, the Commission should not impose a registration requirement on any transfer agent employees.

E. CYBERSECURITY, INFORMATION TECHNOLOGY, AND RELATED ISSUES

In the ANPR, the Commission stated its intent to propose amendments to the transfer agent rules to address how technology in general and cybersecurity risks affect transfer agents' activities, including requiring transfer agents to:

1. Create and maintain a written business continuity plan;
2. Create and maintain basic procedures and guidelines governing the use of information technology, including methods of safeguarding securityholders' data and personally identifiable information; and
3. Create and maintain appropriate procedures and guidelines related to a transfer agent's operational capacity, such as IT governance and management, capacity planning, computer operations, development and acquisition of software and hardware, and information security.

As a constant target of criminals and cyber thieves, banks have long had to be at the forefront of protecting the accounts and assets of the institution and its customers, including personally identifiable customer information. Thus, the safety of customer information is of the highest priority for the banking industry. As stated in the Information Technology Examination Handbook of the Federal Financial Institutions Examination Council (FFIEC), "Information is one of a financial institution's most important assets. Protection of information assets is necessary to establish and maintain trust between the financial institution and its customers, maintain compliance with the law, and protect the reputation of the institution.[37]

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[35] *See*, FDIC *Statement of Policy on Section 19* of the FDI Act, available at https://fdic.gov/regulations/laws/rules/5000-1300.html#fdic5000applicationsus.

[36] OCC Bulletin 2013-29; Federal Reserve Board SR 13-19; FDIC Financial Institution Letter, Guidance For Managing Third-Party Risk, available at https://www.fdic.gov/news/news/financial/2008/fil08044a.html.

[37]The Federal Financial Institution Examination Council was established in 1979 pursuant to Title X of the Financial Institutions Regulatory and Interest Rate Control Act of 1978 (*Pub. L.* 95-630). The FFIEC is a formal interagency body empowered to prescribe uniform principles, *standards*, and report forms for the federal examination of financial institutions by the Federal Reserve, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Bureau of Consumer Financial Protection, and to make recommendations to promote uniformity in the supervision of financial institutions. In 2006, the State

1. PRIVACY OF CUSTOMER INFORMATION

Banks are subject to Gramm-Leach-Bliley Act (GLBA) requirements to protect the privacy and security of customer information, and are regularly audited and examined for compliance with those provisions by federal and state bank regulators. Insured institutions must comply with the *Interagency Guidelines Establishing Information Security Standards* which implement section 501(b) of GLBA and section 216 of the Fair and Accurate Credit Transactions Act of 2003. These regulations are further supplemented through the Information Security Booklets issued by the FFIEC. The FFIEC IT booklets address the following topics: Audit, Business Continuity Planning, Development and Acquisition, E-Banking, Information Security, Management, Operations, Outsourcing Technology Services, Retail Payment Systems, Supervision of Technology Service Providers, and Wholesale Payment Systems.[38]

As noted previously, the *Interagency Guidelines* "afford the FFIEC agencies *enforcement options* if financial institutions do not establish and maintain adequate information security programs."[39] [Emphasis added.]

Because bank transfer agents are already subject to comprehensive regulations and examination with respect to the privacy of customer information, the Commission should exempt banks from any privacy regulations it establishes for transfer agents.

2. BUSINESS CONTINUITY PLANS

Business continuity plans have long been a foundational element of bank supervision. Business continuity planning is addressed as part of the *Interagency Guidelines Establishing Information Security Standards*.[40] As stated in the Business Continuity Planning booklet, "[i]t is the responsibility of an institution's board and senior management to ensure that the institution identifies, assesses, prioritizes, manages, and controls risks as part of the business continuity planning process. The board and senior management should establish policies that define how the institution will manage and control the risks that were identified.[41] This includes assigning knowledgeable personnel and allocating sufficient financial resources to implement properly an enterprise-wide business continuity plan (BCP). "The board and senior management are also responsible for ensuring that the BCP is independently reviewed by the internal or external auditor at least annually. The board and senior management should also review and approve the BCP, with the frequency based on significant policy revisions resulting from changes in the operating environment, lessons learned from BCP testing, and audit and examination recommendations."[42]

Liaison Committee was added to the Council as a voting member. The SLC includes representatives from the Conference of State Bank Supervisors, the American Council of State Savings Supervisors, and the National Association of State Credit Union Supervisors. *See,* http://ithandbook.ffiec.gov/it-booklets/information-security/introduction/overview.aspx.

[38] A listing of the various information technology booklets is available at http://ithandbook.ffiec.gov/it-booklets.aspx. *See also,* Appendix C: References of the FFIEC IT Examination Handbook InfoBase for a listing of the laws, regulations and agency guidance applicable to banks' information protection practices, available at: http://ithandbook.ffiec.gov/it-booklets/management/appendix-c-references.aspx.

[39] *See infra* note 26.

[40] *See,* the FFIEC IT Examination Handbook, Business Continuity Planning, available at: http://ithandbook.ffiec.gov/it-booklets/business-continuity-planning.aspx.

[41] *Id* at 2.

[42] *Id* at 3.

The guidance further states:

> Once the BCP has been approved, the board and senior management should ensure that a comprehensive business continuity training program has been established. As part of this process, they should ensure that employees understand their roles and responsibilities as defined by the BCP. Consequently, the board and senior management should oversee the development of the business continuity training program and ensure that existing and new employees are trained on a continuous basis. . . To maintain the effectiveness of the BCP, the board and senior management should ensure that enterprise-wide BCP tests are conducted at least annually, or more frequently depending on changes in the operating environment. Formal procedures should be established for reporting the implementation of the testing program and test results to the board and senior management. . . After the BCP is approved and tested, the board and senior management have an on-going responsibility to oversee critical business processes and ensure that the BCP is updated to reflect the current operating environment.[43]

With respect to the potential impact on the national clearing and settlement system, the booklet on Business Continuity Planning includes the integration of the institution's role in financial markets, stating:

> Financial industry participants that perform clearing and settlement activities for critical financial markets (core firms) and organizations that process a significant share of transactions in critical financial markets (significant firms) are required to follow interagency guidelines,[44] which are designed to ensure the continued functioning of settlement and clearing activities that support critical financial markets. Critical markets include, but may not be limited to, the markets for federal funds; foreign exchange; commercial paper; and government, corporate, and mortgage-backed securities. Based on these guidelines, key financial industry participants are expected to identify activities that support these critical markets, continually maintain their ability to recover and resume critical operations in a timely manner, and routinely use or test recovery and resumption arrangements. Since these organizations participate in one or more critical financial markets and their failure to perform critical activities by the end of the business day could present systemic risk to financial systems, their role in financial markets should be addressed as part of the business continuity planning process.[45]

Banks are subject to supervision and examination to ensure that banks are in compliance with BCP requirements. And, as noted above, the *Interagency Guidelines* "afford the FFIEC agencies ***enforcement options*** if financial institutions do not establish and maintain adequate information security programs."[46] [Emphasis added.]

Because banks are already subject to comprehensive requirements for business continuity planning, the Commission should exempt bank transfer agents from any business continuity planning requirements it establishes for transfer agents.

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[43] *Id*.

[44] *See*, the "Interagency Paper on Sound Practices to Strengthen the Resilience of the U.S. Financial System," issued by the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the Securities and Exchange Commission.

[45] *See*, the FFIEC IT Examination Handbook, Business Continuity Planning, page 4, available at: http://ithandbook.ffiec.gov/it-booklets/business-continuity-planning.aspx.

[46] *See infra* note 26.

3. INFORMATION SECURITY

Banks must satisfy comprehensive, robust information technology requirements established by the federal bank regulators, including through the FFIEC. The federal bank regulators examine banks using an information technology risk management assessment that focuses on the bank's risk-management practices for securing information assets. These risk management practices include risk assessment, operations security and risk management, audit and independent review, and disaster recovery and business continuity among other things.[47] In fact, the Commission in its *Staff Guidance on Current SCI Industry Standards*, identified as guidance for the organizations subject to Regulation SCI, the FFIEC Operations IT Examination Handbook.[48]

To address the increasing number and sophistication of cyber threats, the FFIEC developed the *Cybersecurity Assessment Tool* to help banks identify risks and evaluate their level of cyber security preparedness. According to the FFIEC, the tool provides a repeatable and measurable process for financial institutions to assess their cyber security preparedness over time.[49] The federal banking agencies regularly examine banks for compliance with the agencies' cyber security requirements.

Banks are also active in the Financial Services Information Sharing and Analysis Center and numerous other organizations involved in sharing critical information about cyber security events and protections against them. Banks commonly work with federal law enforcement agencies such as the Federal Bureau of Investigation and the United States Secret Service to assess and protect against attacks.

From the above very brief description of banking agency requirements with respect to business continuity plans, privacy of customer information, information technology and security, it is clear that bank transfer agents already satisfy stringent standards for safeguarding customer information and assets. Accordingly, to avoid conflicting or duplicative regulations, the Commission should exempt bank transfer agents from any rules on this subject.

a. VENDOR MANAGEMENT

Banks are also subject to rigorous requirements with respect to third-party providers of services. The FFIEC's *Outsourcing Technology Services Booklet* provides guidance and examination procedures to assist examiners and bankers in evaluating a financial institution's risk management processes to establish, manage, and monitor IT outsourcing relationships. More broadly, OCC's Bulletin 2013-29 on *Third-Party Relationships - Risk Management Guidance* outlines OCC's expectations for due diligence in the selection of all third-party vendors and continuing oversight and monitoring.[50]

We note that OCC, the Federal Reserve and FDIC have statutory authority to supervise third-party servicers that enter in IT contracts with banks, including not only IT business lines, but all business lines in which the provider engages to ensure that all covered services are effectively included.[51]

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[47] https://www.fdic.gov/news/news/financial/2005/fil8105.pdf.
[48] Staff Guidance at 6, available at http://www.sec.gov/rules/final/2014/staff-guidance-current-sci-industry-standards.pdf.
[49] FFIEC Cybersecurity Assessment Tool, available at http://www.ffiec.gov/cyberassessmenttool.htm.
[50] OCC Bulletin 2013-29, available at http://www.occ.gov/news-issuances/bulletins/2013/bulletin-2013-29.html.
[51] 12 U.S.C. § 1464(d)(7).

Accordingly, because banks are already subject to strict vendor management requirements, the Commission should exempt banks from any third-party service provider regulations it establishes for transfer agents.

b. PROHIBITION ON INDEMNIFICATION

Separately, the Commission asks whether it should prohibit indemnification of transfer agents by issuers for liability for losses due to the agents' cybersecurity weaknesses. ABA opposes such a prohibition. The term "cybersecurity weakness" is undefined in the ANPR, and would vary in every case according to the capabilities of the transfer agent and the scope of its services. Such a restriction would invariably lead to litigation about the individual facts and circumstances of a breach. Rather, issuers and transfer agents should be free to address such liability during their negotiation of the contract for transfer agent services.

F. DEFINITIONS, APPLICATION AND SCOPE OF CURRENT RULES

The Commission has invited comments on Rule 17Ad-16, notice of assumption. ABA believes that a clarification of the scope of the rule is both warranted and necessary. Subsection (b) of the rule states as follows:

> A registered transfer agent that changes its name or address or that *assumes* transfer agent services on behalf of an issuer of securities, including a transfer agent that assumes transfer agent services on behalf of an issuer of securities because of a merger or acquisition of another transfer agent shall send written notice of such to the appropriate qualified registered securities depository on or before the later of ten calendar days prior to the effective date of such *change in status*. [Emphasis added.]

On its face, the language of this subsection appears to be clear. The notice must be sent when there is a change in status, and the assuming transfer agent is a successor to the previous transfer agent. In addition, the section on *Burden on Competition* which accompanied publication of the rule in the *Federal Register* states, "Transfer agents only have to send a notice when there is a change of transfer agent providing services on behalf of an issuer or a name or address change."[52]

Nonetheless, Commission staff and the FDIC have interpreted the rule as requiring transfer agents to provide the notice to DTC for every *new* engagement. DTC already receives information identifying the transfer agent on new transactions from the underwriter, financial advisor or clearing DTC participant.[53] Based on our conversations with DTC staff, such notices from transfer agents pursuant to Rule 17Ad-16 are discarded without review. This is a waste of both time and money.

ABA, therefore, asks the Commission to make clear that Rule17Ad-16 is intended only to require filing the notice with DTC (1) in cases in which the filing transfer agent is the successor to a previous transfer agent or (2) where there is a change of name or address.

1. ADDITIONAL REGULATORY CLARIFICATION

The Commission has invited comment on specific areas where transfer agents need additional guidance or regulatory clarity regarding the applicability of current rules, how such guidance could best be provided, and whether a rule modification, staff guidance, or an industry roundtable would be helpful. ABA seeks the clarifications set forth below.

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[52] See, FFIEC IT Examination Handbook, *Supervision of Technology Service Providers* at 1.
[53] *See* "The Depository Trust Company (DTC) Eligibility Questionnaire."

1. ABA requests clarification of definition of the word "days" as used in many of the transfer agent rules. When not specified, our members have conservatively applied calendar days. We believe the rule should define “days” as business days as opposed to calendar days.

2. ABA requests a definition of the term "end of day." This has been an issue primarily with Rule 17Ad-16 when banks’ front staff is working until late in the evening and provide information to the operations staff, but the operations staff are no longer in the office. We also request a clear definition of what constitutes a business day with respect to time. We recommend expanding the definition in the existing rules of what is a business day (for example the current rules exclude holidays and weekends) to include time. Finally, the rules are outdated and do not reflect newer technology such as email and smart phones that allow communication well beyond normal business hours.

3. ABA requests that the Commission establish a compliance tolerance on all rules, similar to the 90 percent tolerance in existing Rule 17Ad-2. Many of the rules are silent with respect to a compliance tolerance, and we find that examiners expect 100 percent compliance. The result is that if one item is missed, the transfer agent is in violation of the rules. We request that at minimum Rules 17Ad-16 and 17Ad-5 have no more than a 95 percent compliance tolerance.

II. RESPONSES TO ISSUES RAISED IN THE CONCEPT RELEASE

In the Concept Release, the Commission requests comments on a number of regulatory, policy, and other issues associated with transfer agents and securities generally. These matters include the processing of book-entry securities, the role of banks and broker-dealers with respect to providing services to beneficial owners of securities, as well as transfer agent services provided to mutual funds. ABA’s responses to the matters raised and specific questions asked reflect not only the perspective of the ABA Corporate Trust Committee, but also the perspective of banks as fiduciaries, custodians, transfer agents, and service providers to the myriad of bank clients including but not limited to trusts, pension plans, individuals and families, foundations, mutual funds, private funds, equity and debt issuers.

A. PROCESSING OF BOOK-ENTRY SECURITIES

The Commission has asked a number of questions concerning the implications of the transition from certificated securities to book-entry securities. At the outset, we reiterate our position that should the Commission undertake changes to the current regulations, it (1) should identify the risks it believes exist; (2) must demonstrate that any proposed revisions are tailored narrowly to address the risks it has identified; and (3) determine that the costs of such changes are significantly outweighed by tangible benefits to issuers and securityholders.

The consensus of our members is that the vast majority of the securities they handle as transfer agents are held in book-entry form. Our bank transfer agent members are not aware of processing issues that arise specific to the form of securities; nor have issuer clients raised concerns with them on this matter. Nonetheless, ABA urges the Commission to adopt through rulemaking or guidance exemptions from those requirements related to certificated securities that serve no purpose with respect to book-entry securities. In connection with this guidance, the Commission should clearly delineate what constitutes a certificated security or a book-entry security. For example, the Commission should clarify whether it

views DTC FAST-eligible securities as being held in book-entry form because the global certificate is immobilized or whether in some circumstances they can be viewed as certificated securities.

1. CHANGES TO PROCESSING REGULATIONS

The Commission has asked whether certain changes should be made to its processing rules. We note, however, that the Release does not identify concerns with the current standards or offer situations in which issuers or securityholders have been harmed.

Specifically, the Commission has asked whether it should dispense with the distinction between routine and non-routine items. ABA believes that the Commission should retain the current distinction, because there remain non-routine items that cannot be processed within the time frames required for routine items, despite the use of electronic communications. For example, an item that requires additional documentation and/or the review of such documentation prior to transfer may not be completed in three business days, depending on the time needed for the transfer agent to receive such documentation and review it.

Similarly, the Commission should not revise the turnaround and processing requirements of Rules 17Ad-1 and 17Ad-2, nor shorten Rule 17Ad-9's permitted time frames for posting credits and debits to the master securityholder file. In addition, ABA believes that requiring certificate details be dispatched could raise operational challenges.

ABA is not aware of any issues related to whether a securityholder's instructions are in good order. Bank transfer agents as part of their standard operating procedures communicate with securityholders as to why their instructions are not in good order so that they can ultimately process the transaction with as little delay as possible. We caution the Commission that given the variety of situations that may cause instructions not to be in good order, rigid requirements may result in a greater number of rejections which could, in turn, impact the national clearing and settlement system.

ABA does not believe that the Commission should require transfer agents to provide securityholders with an account statement for transactions. Our members have not received such requests either from their issuer clients or from individual securityholders, as they often receive this information from their broker-dealer; therefore, we question whether such statements would provide any real benefit to securityholders. Registered holders currently receive a physical certificate, which itself provides notice of a transaction. Thus, the benefits of such statements would not likely outweigh the significant costs of providing them that would be borne by transfer agents and then necessarily passed on to their clients.

B. TRANSFER AGENTS TO MUTUAL FUNDS

In the Concept Release, the Commission has documented the evolution of the services provided by transfer agents to mutual funds, the differences from services provided by operating company transfer agents and the complexity of their services. Importantly, mutual fund transfer agents provide the calculations involving the number of shares purchased and redeemed in any given time period, which factors into the determination of a mutual fund's net asset value (NAV).

We have set out our position above that all bank transfer agents should be exempt from new or revised transfer agent regulations where they duplicate or conflict with existing banking statutes and regulations. Similarly, ABA believes that (1) to the extent that bank mutual fund transfer agents are subject to a separate overarching regulatory regime pursuant to the Investment Company Act of 1940 and its

implementing regulations, and (2) the transfer agent regulations result in duplicative or conflicting rules, mutual fund transfer agents should be exempt from the transfer agent rules. The Commission has already adopted this construct with respect to Rule 17Ad-4. We address specific questions below.

The Commission has asked whether it should impose disaster recovery requirements on mutual fund transfer agents. As discussed in Section E.2 above, bank transfer agents, regardless of the types of securities they service, are already subject to robust business continuity plan requirements by the federal bank regulators. Therefore, to avoid transfer agent regulations that conflict with or duplicate existing banking regulations, the Commission should exempt all bank transfer agents from any disaster recovery requirements.

In Question 105, the Commission again seeks information on the types of issuers transfer agents have as clients and the types of work performed for those clients. As discussed more fully in Section A.4 above, ABA believes that issuers are able to discern the types of services a transfer agent provides from the disclosures already provided on Form TA-2, which is publicly available once filed. Again, as stated above, we adamantly oppose a requirement that transfer agents disclose the names of bank transfer agents' issuer clients – it is not properly the prerogative of transfer agents to disclose the names of issuer clients. And again we note that the Commission has access to this information through the recordkeeping requirements of Rule 17Ad-6.

The Commission has asked whether it should amend Rule 17Ad-4(a) to eliminate the current exemption for mutual fund transfer agents from certain turnaround rules. ABA is not aware of any issues related to turnaround times. Further, regardless of the exemption, the existing turnaround rules are enforced by the federal bank regulators on bank mutual fund transfer agents. More importantly, however, those rules are made irrelevant by the requirements of the Investment Company Act. Pursuant to Rule 22(c)(1), because purchases and redemptions factor into the calculation of a mutual fund's daily NAV, mutual fund transfer agents must turnaround such actions in sufficient time for the NAV calculation to be made

The Commission has also asked how often mutual fund transfer agents also serve as fund administrators for the same funds. ABA believes this occurs often and does not pose a conflict of interest, because the duties involved are largely ministerial in nature. The mutual fund transfer agent does not provide any type of investment advice. Indeed some mutual fund transfer agents will not accept one appointment without the other so that they are in a position to control the risks from both functions.

ABA is not aware of issues related to the timely delivery of critical information such as daily NAVs and dividend accrual information. As stated above, bank mutual fund transfer agents must comply not only with the transfer agent rules but also with the relevant rules of the Investment Company Act. Not only are they examined by the SEC and the bank regulators, but there must also be an independent audit of these functions. We believe that any issues that may arise are addressed quickly and completely by the banks themselves in conjunction with their multiple examiners.

The Commission seeks input on whether it should promulgate rules governing "as of" transactions and whether they should be reported on Form TA-2. These types of transactions occur regularly, although the volume is fairly low. Currently these issues are addressed by the parties involved with the related costs paid by the responsible party and are simply a function of "business as usual." ABA does not believe that additional information about such transactions would benefit shareholders. Nor does the Release provide evidence of concerns the Commission may have with "as of" transactions or of harms to issuers or securityholders. Absent such information, ABA does not believe that there is any reason to address these inevitable transactions in the transfer agent rules.

The Commission has asked a number of questions concerning intermediaries that act as sub-transfer agents. Our members who are mutual fund transfer agents may monitor these intermediaries with respect to performance and KYC requirements, and may in some instances conduct independent audits of their activities. ABA has provided our views on such intermediaries in Section D below.

C. MISCELLANEOUS

Our bank transfer agents that provide services with respect to American Depositary Receipts (ADRs) report that they process ADRs in accordance with the requirements of the transfer agent rules in the same manner as for any other security.

D. BANK AND BROKER-DEALER RECORDKEEPING FOR BENEFICIAL OWNERS

ABA's response to the Release's section on bank and broker-dealer recordkeeping for beneficial owners reflects the perspective of our member banks acting as fiduciary and custodian to their clients, including trusts, estates, pension plans, foundations, private funds, as well as individuals and families. When acting as fiduciary or custodian for beneficial owners of securities, banks provide a variety of services, including recordkeeping, settlement, paying agent, and safekeeping. It is important to note that these banks, when acting in these capacities, do not provide "transfer services" as mentioned in the Release, assuming this undefined term means the transferring of record ownership, because in fact no transfer takes place and the shareholder of record does not change. These banks, however, are keeping detailed records of the ownership interest of their clients and providing other related services.

As noted in the *OCC Custody Services Handbook*, "custody services" are contractual in nature and may be provided to bank customers, such as "mutual funds and investment managers, retirement plans, bank fiduciary and agency accounts, bank marketable securities accounts, insurance companies, corporations, endowments and foundations, and private banking clients," as well as other banks and trust companies for those institutions' customers.[54] Unlike with registered transfer agents, the custody bank's contractual relationship is with the beneficial owner or intermediary on behalf of the beneficial owner and not with the issuer of the security. The bank has no privity of contract with the issuer, has not "engage[d] on behalf of an issuer of securities," and thus is not a transfer agent, nor is required to register as one as specified in the Securities Exchange Act of 1934.[55]

When providing custody services for its customers, a bank is subject not only to the provisions in the custody agreement, but also to bank laws, regulations, and guidance, as well as tax and financial reporting requirements, Bank Secrecy Act requirements, and Employee Income Retirement Securities Act rules, if applicable. In response to Question 97, the following is a list of just some of the rules governing bank custody services:

1. Securities Transaction Recordkeeping Rules – 12 CFR Part 12; 12 CFR § 208.34; 12 CFR Part 344; 12 CFR Part 151
2. Shareholder Communications Rules – 17 CFR § 240.14-17
3. U.S. Investment Company Assets – 17 CFR § 240.17f
4. ERISA 3(14)(A) – governing custody services provided to qualified plans

[54] *OCC Custody Services Handbook* 1 (2002), available at http://occ.gov/publications/publications-by-type/comptrollers-handbook/custodyservice.pdf.
[55] 15 U.S.C. § 78c, 78q-1.

5. Regulation U – 12 CFR § 221
6. Bank Secrecy Act - 12 CFR Part 21, Subpart C; 12 CFR § 208.63; 12 CFR Part 326, Subpart B; 12 CFR § 390.354
7. Overdrafts (Regulation D) – 12 CFR § 204
8. Lost and Stolen Securities – 17 CFR § 240.17f-1
9. State laws on abandoned property (Escheatment)

In addition, as noted throughout this letter, banks are subject to cybersecurity, business continuity, and other requirements for purposes of the safety and soundness of the institution. Transfer agents that are not banks may not always be subject to all of the regulations and laws listed above.

Unless the Commission plans on revisiting the longstanding and overwhelmingly exercised right[56] of shareholders to object to sharing information with the issuer of a security, ABA does not see the point of contemplating whether the Commission should require "entities that are regulated by the Commission, including brokers, banks, or others who provide transfer and recordkeeping services to beneficial owners, to provide or 'pass through' securityholder information to transfer agents."[57] Of particular interest to our members engaged in custody and fiduciary services is the right of shareholders to object to the disclosure of their names and addresses to the issuers of the securities they own and their transfer agents. Bank customers generally do not want their personal information shared with others, especially in the case of bank trust and fiduciary customers who have vested the bank with investment discretion over their accounts. In addition, banks offering these services are subject to state fiduciary and privacy laws that limit the sharing of information and place great liability on banks that violate these rules.

IV. CONCLUSION

ABA appreciates the opportunity to provide our comments on the Release. As the Commission continues its efforts to modernize the transfer agent regulations, we urge it to consider the guiding principles we have set out in Section I. We believe we have amply demonstrated that existing bank regulatory requirements already address the areas of concern to the SEC with respect to transfer agents. Therefore, to avoid the significant potential for conflicting or duplicative regulation, as described above the Commission should exempt bank transfer agents from any anticipated amendments or additions to its transfer agent rules.

If you have any questions concerning these comments or would like additional information on the issues discussed in this letter, please do not hesitate to contact the undersigned.

Sincerely,

Cristeena G. Naser
Vice President and Senior Counsel
Center for Securities, Trust & Investment

[56] For accounts opened before December 25, 1985, this right is established by statute in Section 14 of the Securities Exchange Act of 1934 (15 USC § 78n (b)(2)).
[57] Question 100, Release at 159.