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321 North Clark Street  
Chicago, IL 60654  
(312) 988-5588  
Fax: (312) 988-5578

[www.ababusinesslaw.org](http://www.ababusinesslaw.org)  
[businesslaw@abanet.org](mailto:businesslaw@abanet.org)

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Susan Daly Tobias  
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(312) 988-6244  
[suedaly@staff.abanet.org](mailto:suedaly@staff.abanet.org)

Via Email: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

May 26, 2011

U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-1090  
Attention: Ms. Elizabeth M. Murphy, Secretary

Re: File No. 07-11-11  
Rel. No. 64,099 (Mar. 18, 2011)  
Proposed amendments to Rule 17Ad-17

Ladies and Gentlemen:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "Committee") of the Business Law Section (the "Section") of the American Bar Association (the "ABA") in response to the request for comments by the Securities and Exchange Commission (the "Commission") on the proposals by the Commission to adopt rules governing the duties of broker-dealers and paying agents (as defined) to search for lost securityholders (the "Lost Securityholder Proposal"). This letter was prepared by members of the Committee's Subcommittee on Trading and Markets, with input from other members of the Committee.

The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, these comments do not represent the official position of the Section.

The Committee thanks the Commission for this opportunity to comment on the Proposed Rule. The subcommittee believes that the rule as proposed warrants further consideration by the Commission. Below, we suggest clarifying rule text changes, and respectfully urge the Commission to consider whether the rule as proposed is overbroad and whether it provides adequate notice to covered entities.

**A. Lost securityholders**

Section 17A(g) of the Securities Exchange Act of 1934 ("Exchange Act"), which was added by Section 929W of the Dodd-Frank Act, requires the Commission to extend to brokers and dealers the application of Rule 17Ad-17 (as in effect on December 17, 1997), which currently applies only to certain transfer agents. The Release states that the revised rule would apply to "all brokers and dealers" as defined in Sections 3(a)(4)(A) and (5)(A) of the Exchange Act.<sup>1</sup>

Rule 17Ad-17(a)(1) as proposed to be amended would result in a significantly broader application of the rule to brokers and dealers, *i.e.*, to "all brokers and dealers." In contrast, neither the current rule nor the proposed revision applies to all transfer agents. Rather, Rule 17Ad-17 applies only to "recordkeeping transfer agents." That term is defined in Rule 17Ad-9(h) as "the registered transfer agent that maintains and updates the master securityholder file." Exchange Act Section 17A(c)(1) requires registration only of entities that "perform the function of transfer agent with respect to any security registered under section 12 of [the Exchange Act], or which would be required to be registered except for [specific statutory exemptions]." In sum, Section 17Ad-17 applies only to registered transfer agents that perform a recordkeeping transfer agent function for a Section 12 security.<sup>2</sup> We understand that, once registered as a transfer agent, the provisions of Rule 17Ad-17 are applied to all securities by recordkeeping transfer agents.

As proposed, however, *all* brokers and dealers (whether registered under the Exchange Act or not) would be required to: (1) identify lost securityholders on their "customer security account" records; and (2) conduct searches for lost securityholders. The Release does not discuss whether any brokers and dealers as defined would be excluded from the scope of the rule.<sup>3</sup> Moreover, these requirements would apply to every broker and dealer irrespective of whether any of its customer security accounts contained securities registered under Section 12. It is unclear whether the Congress or the Commission intended this broad application to brokers and dealers. We respectfully urge the Commission to review its intended scope.<sup>4</sup>

The cost-benefit and Paperwork Reduction Act analyses set forth in the Release may be inadequate if the breadth of the proposed application to brokers and dealers was not considered in preparing those analyses.<sup>5</sup> For example, the Release states that brokers and dealers already maintain

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<sup>1</sup> Release at 16708.

<sup>2</sup> Recordkeeping transfer agents must search for lost securityholders that appear on their "master securityholder file." This term is defined in Rule 17Ad-9(b) and is used in a number of transfer agent rules, including Rule 17Ad-17. We note, however, that the definitions in Rule 17Ad-9 apply to specific rules, but Rule 17Ad-17 is not one of them. The Commission may wish to adjust Rule 17Ad-9 when it acts on the proposed amendments.

<sup>3</sup> See, e.g., Exchange Act Rule 15a-10 (Exemptions of Certain Broker-Dealers with Respect to Security Futures Products).

<sup>4</sup> If the Commission believes that the statute requires it to adopt a rule that is overbroad, the Commission could consider using its exemptive authority in Section 36 of the Exchange Act to temporarily or permanently adjust the scope of the provisions.

<sup>5</sup> The Release notes that the Commission disclaims responsibility for the costs that would be imposed by the proposed rule, but nevertheless requested comment on potential costs. Release at 16710.

much of the new information required to be collected, and therefore there should not be additional cost, and the estimated burden imposed would be about two minutes per account per search.<sup>6</sup> Among other things, this does not appear to take into account the cost to brokers and dealers of setting up a process to identify lost securityholders, which is something that not all brokers and dealers may currently have in place.

#### **B. Missing securityholders**

Proposed Rule 17Ad-17(c)(1) would require each “paying agent” 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.” Proposed paragraph (c)(3) provides that a “securityholder shall be considered a ‘missing securityholder’ if a check has been sent to the securityholder and the check is not negotiated 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.”<sup>7</sup>

The term “paying agent” is defined in proposed Rule 17Ad-17(c)(2) to “include any issuer, transfer agent, broker, dealer, investment adviser, indenture trustee, custodian, or any other person that accepts payment from the issuer of a security and distributes the payments to the holder of the security.” This provision sweeps very broadly. It applies to *all* transfer agents, brokers, dealers, investment advisers, indenture trustees, custodians, and other persons who transmit payments from *any* issuer. We note initially that not all of the covered entities are registered with the Commission. Indeed, the “any other person” language may encompass persons entirely outside the Commission’s jurisdiction.

Most importantly, the proposed rule’s obligations would apply to checks sent by or on behalf of *any* issuer, whether or not its securities are registered under Section 12. Even transfer agents may be taken unawares by this provision, because it is not limited to recordkeeping transfer agents as is the case with the lost securityholder provision discussed above. We wonder whether the Congress or the Commission intended such a broad scope. Here again, the cost-benefit and Paperwork Reduction Act analyses may inadequately take the breadth of these proposals into consideration.<sup>8</sup>

Proposed paragraph (c)(2) appears to contemplate that a paying agent will be the issuer or the issuer’s agent. Therefore, we suggest that paragraph (c)(2) could be revised to read: “The term

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<sup>6</sup> Release at 16709.

<sup>7</sup> We note that “missing securityholder” is something of a misnomer, because what is missing is a check that has been sent to a securityholder. The securityholder is not a “lost securityholder” unless the check or some other communication is returned to the transfer agent, and the securityholder may in fact have received the check and lost it or mislaid it.

<sup>8</sup> For example, the Release estimates that the proposed rule would apply to “10,379 issuers that file reports with the Commission; ...” Release at 16709. The cost estimates are accordingly based on this group of issuers, rather than the universe of issuers encompassed by the text of the proposed rule, which would include private issuers, municipal issuers, etc. Given this broader scope, the number of paying agents, and their associated cost burden, may be larger than the Commission’s estimates.

paying agent means any issuer [whose securities are registered under Section 12 or exempt from registration by Sections 12(g)(2)(B) or (g)(2)(G)] that distributes payments to the holders of its securities, or any other person that accepts payments from the issuer and distributes the payments to the holders of such security.”

### **C. Adequate notice**

All of the entities that will have new responsibilities under the proposal should have adequate notice of their obligations. However, present Rule 17Ad-17 applies only to recordkeeping transfer agents, and the rule as proposed to be revised would continue to be imbedded in the transfer agent rules. Therefore, some transfer agents, brokers, dealers, and other entities may not become aware of new provisions that apply to them.

We believe that either a separate rule containing the substantive provisions of the proposal, or a rule referencing Rule 17Ad-17, should be included in the Rule 15b- series to provide fair notice to brokers and dealers of their new obligations to search for lost securityholders and to document their compliance with the requirements.<sup>9</sup>

“Paying agents” are a much broader class of entities, some of which, as noted above, may not be registered with the Commission. Therefore, simply publishing a rule may not provide effective notice to this diverse collection of entities that they have new obligations with regard to missing securityholders. Because a non-issuer paying agent will be the issuer’s agent, it seems appropriate to require the issuer to provide notice to its paying agent of the paying agent’s obligation to communicate with missing securityholders under the rule and to demonstrate its compliance with the rule.<sup>10</sup>

### **D. Rule text suggestions**

Rule title. The proposed change to the rule’s title would make it very cumbersome. The language may be intended to provide notice to brokers, dealers, and paying agents that the rule applies to them, but we believe that that would not be as effectual as our suggested approach above to provide notice to affected entities. Accordingly, we suggest that the title could simply be “Lost and missing securityholders.”

Rule text. We offer the following suggestions for clarifying the rule text (new text underscored; deleted text in brackets):

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<sup>9</sup> Proposed paragraph (d) requires covered entities to maintain records to demonstrate compliance with the rule’s provisions.

<sup>10</sup> If the Commission does not adopt our suggested approach, we believe that separate rules should be added for issuers, brokers, dealers, investment advisers, indenture trustees, and other covered entities that have a regulatory relationship with the Commission. However, that alternative would not provide notice to “other entities” that are outside the Commission’s present regulatory jurisdiction.

(a)(1) Every recordkeeping transfer agent whose master securityholder file includes accounts of lost securityholders, and [each] every broker or dealer that holds customer security accounts that include accounts of lost securityholders, shall .... In exercising reasonable care to ascertain such lost securityholders' correct addresses, each recordkeeping transfer agent, [and each] broker, or dealer shall conduct two data base searches using at least one information data base service. The transfer agent, [and] broker, or dealer shall ....

(c)(2) The term *paying agent* [shall include] means, [[with respect to any security that is registered under Section 12 of this title or which would be required to be registered except for the exemption from registration provided by subsection (g)(2)(B) or (g)(2)(G) of that section,]]\* any issuer[,] that distributes payments to the holders of its securities, [or any transfer agent, broker, dealer, investment adviser, indenture trustee, custodian,] or any other person that accepts payments from the issuer [of a security] and distributes the payments to the holders of such security.

\*The double-bracketed text would limit the scope to paying agents for Section 12 securities and certain exempted securities. Alternatively, this provision could be drafted to apply only to entities that are paying agents for at least one such security, which would parallel the scope of the present lost securityholder rule.

Once again, the Committee appreciates the opportunity to submit these comments. Members of the Committee are available to meet and discuss these matters with the Commission and its staff and to respond to any questions.

Very truly yours,

/s/ Jeffrey W. Rubin  
Jeffrey W. Rubin, Chair of the Federal  
Regulation of Securities Committee

Drafting Committee:

Larry E. Bergman, Chair  
W. Hardy Callcott  
Jeffrey W. Rubin

cc:

The Hon. Mary L. Schapiro, Chairman  
The Hon. Luis A. Aguilar, Commissioner  
The Hon. Kathleen L. Casey, Commissioner  
The Hon. Troy A. Paredes, Commissioner  
The Hon. Elisse B. Walter, Commissioner  
Ms. Meredith Cross, Director, Division of Corporation Finance  
Mr. Thomas Kim, Chief Counsel, Division of Corporation Finance