



Storm Clouds on the Horizon? The SEC Transfer Agent Rules Release from a Mutual Funds Transfer Agent Perspective

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INTRODUCTION AND HISTORICAL CONTEXT

On December 22, 2015, the Securities and Exchange Commission (SEC) presented the transfer agent community with a holiday present – a long-awaited release related to the modernization of the SEC’s transfer agent rules. The release can be broken down into three sections: (1) A history of the role and regulation of transfer agents in the United States clearance and settlement system; (2) An Advance Notice of Proposed Rulemaking (ANPR) that discusses the rulemaking that the SEC plans to pursue; and (3) A Concept Release that seeks comments on rulemaking that the SEC may consider.

The first section provides a well-written description of the history of our clearance and settlement system, some of the industry issues that occurred in the past, and the evolution of the regulatory environment governing transfer agents. This historical review provides a great background for understanding the SEC’s perspective of the transfer agent industry and the context for the SEC’s decision to undertake the modernization of transfer agent regulations. Transfer agents may want to consider providing this section to employees so that they might have a deeper understanding of the evolution of our industry.

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ADVANCE NOTICE OF PROPOSED RULEMAKING

The ANPR outlines specific areas that the SEC intends to consider for future rulemaking, and seeks public input to help shape associated rule proposals.

Generally, the rulemaking contemplated in the ANPR would appear to have the greatest impact on operating company (stock or bond) transfer agents, particularly small transfer agents. Mutual fund transfer agents typically already maintain controls related to numerous compliance obligations being considered in the ANPR.

There are, however, some significant issues that the ANPR presents for mutual fund transfer agents. First, and perhaps most importantly, the ANPR discusses potential rulemaking that, if adopted, would require far more disclosure of sensitive information in a transfer agent’s registration and annual reporting filings on SEC Forms TA-1 and TA-2, respectively. For example, the SEC is considering whether transfer agents should be required to include, among other things: (1) financial reports (e.g., statements of financial condition, income, and cash flows); (2) the issuers and securities for which a transfer agent is providing transfer agent and other services; and (3) the specific services being provided or expected to be provided for each issuer or security, regardless of the nature of those services.



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The SEC is seeking comment on whether Forms TA-1 and/or TA-2 should require the disclosure of information regarding fees charged by the transfer agent, and whether the SEC should require transfer agents to file material contracts with the SEC as Form TA-2 exhibits. The disclosure of such sensitive information in a public filing raises significant anti-competition concerns. One is left wondering if it might be more appropriate for the SEC to obtain such information through the examination process rather than through a public filing process.

Other items discussed in the ANPR may be less impactful to mutual fund transfer agents, such as the discussion around the SEC's intent to propose rules requiring transfer agents to adopt policies and procedures reasonably designed to achieve compliance with applicable securities laws and to designate a Chief Compliance Officer (CCO). While most mutual fund transfer agents likely already have such policies and procedures in place, and may have designated the CCO, this rulemaking would likely require a more formal approach, like compliance obligations imposed on mutual funds under SEC rule 38a-1 or similar broker/dealer requirements. Consequently, such rulemaking may result in changes not only at the transfer agent itself, but also potentially changes the way mutual funds oversee their transfer agents. The ANPR's vague reference to the SEC's intent to amend SEC rule 17Ad-12 to, among other things, comply with minimum best practices requirements for specific unclaimed property procedures also signals a potential impact to mutual fund transfer agents.

Mutual fund transfer agents would be well advised to monitor proposed rulemaking by the SEC following this ANPR. While on the surface the ANPR seems only moderately impactful to our industry (except for TA-1 and TA-2 disclosures), innocuous-looking items in the ANPR may loom large when associated rulemaking is actually proposed. For example, requirements related to contracts between mutual funds and issuers may seem to be an area that would not impact mutual funds transfer agents who already have such contracts, but may be problematic if a proposed rule requires certain contract provisions that are inconsistent with industry practice.

CONCEPT RELEASE

The concept release addresses additional areas of interest in which the SEC seeks public comment. Received comments will be considered in connection with potential rulemaking, such as eliminating investment company exemptions for turnaround time rules and requiring issuance of 10b-10 confirms to direct shareholders.

Perhaps the area of greatest interest to mutual fund transfer agents is the concept that, given the significant differences between operating company transfer agents and mutual fund transfer agents, the SEC is considering whether to adopt rules for mutual fund transfer agents that are tailored to the mutual funds industry. While having separate rules for mutual fund transfer agents may seem to make sense, exactly what these rules may turn out to be could have a very significant impact to the mutual fund industry.

Other areas of significant interest include the SEC's concern over the lack of transparency related to the identity of beneficial owners of intermediaries, particularly omnibus account owners. The mere suggestion that such beneficial owner, or subaccount, information should be provided to the transfer agent could, if imposed, reduce the efficacy of the omnibus operating model. The SEC also appears to be considering whether transfer agents should have oversight responsibility for sub-transfer agents. This may make sense in some circumstances, but may not where the sub-transfer agent has a contractual relationship with the mutual fund and not with the transfer agent. Also, the SEC discussed its concern that transfer agents sometimes perform "broker/dealer type" activities, and intermediaries perform "transfer agent-like" activities, and whether the supervisory and training requirements should be modified for either or both types of entities. These are but a few of the many issues that the SEC included in the concept release for public comment.

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CONCLUSION

For mutual fund transfer agents, the most immediate impact presented in the SEC's release appears to be the potential imposition of significantly greater, and some might argue inappropriate, public disclosure of sensitive information in TA-1 and TA-2 filings. Nevertheless, mutual fund transfer agents would be wise to monitor all rulemaking that will emerge from the ANPR in order to be aware of unexpected consequences related to such rule proposals.

The potential impact of rulemaking related to issues covered in the Concept Release may be far more significant, although potential rulemaking related to these issues remains vague at this point and appear to be farther off. Still, mutual funds should keep a weather eye on the horizon as the SEC pursues transfer agent rule modernization.

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