# THE STA
# SECURITIES TRANSFER ASSOCIATION, INC.

*Established 1911*



By E-Mail

September 24, 2019

Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: **File No. S7-08-19**, Release No. 34-86129, Concept Release on Harmonization of Securities Offering Exemptions ("Concept Release")

Dear Secretary Countryman:

On behalf of the Securities Transfer Association, Inc. ("STA"), we want to thank the Securities and Exchange Commission ("Commission") for the opportunity to comment on the Concept Release concerning the harmonization of securities offering exemptions. The STA commends the Commission on its extensive and thorough view of the matters reflected in the Concept Release and its efforts to streamline and harmonize the current securities offering structures to benefit issuers, investors and industry participants.

The STA is an organization of professional recordkeepers that interact daily with both issuers and their investors concerning securities offerings, issuances, and transfers. Founded in 1911, the STA's membership is comprised of over 130 large and small registered transfer agents in the United States (U.S.) and Canada maintaining the records of more than 100 million registered shareholders on behalf of more than 15,000 issuers (from the largest public companies to small privately held companies). The transfer agents that comprise the membership of the STA primarily are equity transfer agents and range in size from small businesses to a limited number of large institutions that collectively provide transfer agency and related services to the corporations listed on national securities exchanges in the U.S. as well as private companies trading in the OTC marketplace.

While the STA believes the topic of harmonization of securities offering exemptions generally would be more appropriately responded to by issuers, investors and other market participants, the STA and its members have particular interest and concern regarding the area of resales of restricted securities discussed in the Concept Release, especially to the extent that the Commission expands the securities offerings that would be exempt from registration. The STA would like to offer the following comments:

**Obligations of Transfer Agents under the Uniform Commercial Code**

In April 2016, the STA submitted its comment letter[1] to the Advance Notice of Proposed Rulemaking, Concept Release and Request for Comment on Transfer Agent Regulations (the "2016 Comment Letter"). In the 2016 Comment Letter, the STA conveyed the difficult position transfer agents are in with respect to processing transactions in restricted securities, due to their obligations to their issuer clients and independently to shareholders under the Uniform Commercial Code ("U.C.C.") and conflicting expectations of the Commission for transfer agents to act as "gatekeepers" to prevent fraud or other misconduct in connection with such transactions. The STA would like to reiterate and direct the Commission to its comments in the 2016 Comment Letter with respect to restricted securities, including its request for rulemaking or clear guidance from the Commission on its expectations of transfer agents.

As set forth in the 2016 Comment Letter, under the U.C.C., the transfer agent generally is legally obligated to process requests for transfer, including removal of restrictive legends, and is required to act "in good faith and due diligence in performing his functions".[2] Failure to follow such U.C.C. requirements can subject transfer agents to shareholder litigation, as Article 8–407 of the U.C.C. imposes on transfer agents the same liability to shareholders as the issuer has in performing these functions itself. In the context of the transfer and/or resale of restricted securities, under the U.C.C., it is the duty of the transfer agent to remain neutral in disputes between the issuer and shareholder over removal of restrictive legends.[3] However, based on SEC expectations that transfer agents perform certain due diligence before processing a request, transfer agents may be placed in a position to have to reject a request for insufficient documentation as to the legality of the request, and face liability to the shareholder and/or issuer clients, without any protection from SEC rules or guidance on which they can rely in rejecting such request.

**Legal Opinions**

Under Federal securities laws, the issuer is primarily liable for any unregistered distribution of its securities, unless there is an exemption from registration under the Securities Act of 1933 ("1933 Act"). However, in order to determine whether a request for the removal of a restricted legend is in good order and to protect themselves from potential liability for an unregistered distribution under Section 5 of the 1933 Act, transfer agents frequently request opinions of counsel from issuers or shareholders attesting to the legality of such a request. The STA notes that the Commission Examination Staff routinely requests copies of such legal opinions in its examination of transfer agents. However, as *there is no statutory or regulatory support for obtaining a legal opinion*, transfer agents are left without a legitimate basis for insisting on such opinions prior to processing the requests. This leads to conflicts between transfer agents and their issuer clients or shareholders and their respective counsel who often resist or refuse to provide legal opinions without any legal or regulatory requirement to do so, and due to other factors such as the expense and difficulty of obtaining approval from law firm opinion committees.

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[1] *See* Letter dated April 13, 2016 from Todd J. May, President, The Securities Transfer Association, Inc. to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission regarding SEC Release No. 34-76743, File No. S7-27-15.

[2] U.C.C. Section 8-406(1)(a).

[3] *See, e.g.,* Bender v. Memory Metals, Inc., 514 A.2d 1109 (Del. Ch. 1986).

As a result of these difficulties faced by transfer agents, the STA requested in the 2016 Comment Letter that the Commission adopt a safe harbor or provide other guidance clarifying expectations of transfer agents with respect to the removal of restricted legends.

**"Safe Harbor" Proposal and Clear Guidance**

In the Concept Release, the Commission asks in Question Number 138 whether there are other steps that could be taken to improve the "trading liquidity of securities exempt from registration." The STA believes the lack of clear guidance on expectations of transfer agents in connection with the removal of restricted legends can be a hindrance to trading liquidity. Transfers or sales may be delayed or even fail due to disputes between transfer agents, issuers, shareholders and/or other market participants on what documentation is required to remove a restricted legend. The STA would like to restate its request to the Commission for the adoption of a safe harbor rule or provide other guidance indicating that:

> "A transfer agent will not be deemed to have participated in an unregistered distribution of securities in violation of the 1933 Act, or subject to Commission enforcement action, if it meets the following conditions:
>
> > The transfer agent relies in good faith on representations in writing made by an authorized officer of the issuer that the shares presented have been registered with the Commission under the 1933 Act; or,
> >
> > The transfer agent relies in good faith on an opinion of counsel indicating that the shares may be issued without a restrictive legend, that the restricted legend may be removed from the shares, or, that the shares may be transferred without a legend being placed on the transferred shares, in compliance with the 1933 Act; provided that the opinion identifies the relevant exemption and contains a detailed description of facts and how they support the opinion."[4]

The adoption of a safe harbor or establishment of clear guidance would provide certainty to the marketplace and result in a more efficient, timely and uniform process for the transfer and sale of securities exempt from registration, thus leading to improved liquidity.[5] In addition, having established requirements or guidelines for the due diligence of restricted securities transactions would help serve the Commission's goal of preventing the unregistered distribution of securities and microcap fraud.

**Proposed Changes to Rule 144**

In Question Number 132 of the Concept Release, the Commission asks whether it should make any revisions to Rule 144, the non-exclusive safe harbor for the resale of restricted securities. The STA believes one area for potential revisions to Rule 144 relates to the requirements for former "shell" companies under Rule 144.

The current language of Rule 144(i) can be read to require any issuer that has ever been a shell to maintain its status as a former shell indefinitely in order for a shareholder to avail itself of the safe harbor of Rule 144. This interpretation places a great burden on issuers, shareholders and transfer agents to be responsible for historical analysis of issuers in connection with requests for legend

[4] *See* 2016 Comment Letter at page 26.

[5] The STA notes that SEC Chairman Jay Clayton in a speech earlier this year acknowledged the gap between Commission expectations and rulemaking in this area, indicating a proposed rule would be considered as part of any updates to the transfer agent rules. *See*, Equity Market Structure 2019: Looking Back & Moving Forward, Remarks at Gabelli School of Business, Fordham University, SEC Chairman Jay Clayton and Brett Redfearn, Director of the SEC Division of Trading and Markets, New York, New York, March 8, 2019.

removal. It also prevents a shareholder from having a legend removed in the absence of a sale irrespective of how long the shares have been outstanding or for how many years the issuer has been in compliance. This result seems antithetical to the purpose underlying the reduced holding periods which have been adopted in connection with Rule 144.

In addition, the current language has created a greater impetus for shareholders to rely on the general exemption permitted by 4(a)(1) without the benefit of the safe harbor provisions of Rule 144.. As the Rule has reduced the holding periods necessary to qualify for the safe harbor, shareholders are increasingly demanding that the period necessary to demonstrate that the shares have "come to rest" be equally reduced. In the absence of guidance from the Commission, this has created a grey area that places transfer agents in constant conflict with shareholders and issuers seeking entry into the marketplace. Addressing these issues would create greater certainty for processing these requests and reduce the risk that unauthorized securities will be made available for sale.

**Conclusion**

In connection with the resale of securities that are exempt from registration, the STA again respectfully requests that the Commission provide a safe harbor to transfer agents or guidance on requirements that would satisfy federal securities laws. We further suggest changes to Rule 144 as noted above to remove the ambiguities surrounding former shell companies, and reduce the burden on all parties concerning the resale of securities of former shell companies.

Thank you again for providing the STA with the opportunity to provide these comments in response to the Concept Release.

Sincerely,

Todd J. May
President
The Securities Transfer Association, Inc.

cc: Christian Sabella, Deputy Director
Moshe Rothman, Assistant Director
Thomas Etter, Special Counsel
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