

February 29, 2016  
Brent Fields  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

RE: Comments on File No. S7-27-15 (Advance Notice of Proposed Rulemaking, Concept Release, and Request for Comment on Transfer Agent Regulations)

Dear Mr. Fields:

FOLIO*fn* Investments, Inc. (“Folio”) welcomes the opportunity to provide comments in response to the Advance Notice of Proposed Rulemaking, Concept Release, and Request for Comment on Transfer Agent Regulations issued by the Securities and Exchange Commission (“Commission”) on December 22, 2015 (“the Transfer Agent Concept Release”).<sup>1</sup> The Commission seeks comments in the Release about a number of issues relating to transfer agents, including the rules relating to the role of transfer agents in crowdfunding offerings. This letter provides Folio’s views on certain aspects of those rules.

Folio is a self-clearing registered broker-dealer that engages in a range of business lines via web interface, including equity trading, mutual fund sales, facilitation of unlisted securities offerings, and securities transaction clearing and custody. Folio also provides clearing services for third-party introducing broker-dealers and provides support for online self-directed retail accounts and for registered investment advisors who custody client assets at Folio and conduct investment management of those assets on Folio’s platform.

### **Comments Regarding the Transfer Agent Concept Release**

As the Commission notes in the Transfer Agent Concept Release, certain rules adopted pursuant to the JOBS Act relate to transfer agents. Rule 12g-6, adopted along with Regulation Crowdfunding, creates a new exemption from the record holder count under Section 12(g) of the Securities Exchange Act of 1934 for securities issued under the crowdfunding exemption if certain conditions are met. One of those conditions is that the issuer “has engaged a transfer agent registered pursuant to Section 17A(c) of the [Exchange] Act to perform the function of a transfer agent with respect to such securities.”<sup>2</sup>

A similar provision was included in the Commission’s recently-adopted amendments to Regulation A. Rule 12g5-1 was amended to provide that securities issued in a Tier 2 Regulation A offering are exempt from the record holder count under Section 12(g) if the

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<sup>1</sup> Release No. 34-76743; File No. S7-27-15.

<sup>2</sup> 17 CFR 240.12g-6(a)(3).

issuer takes certain steps, including engaging “a transfer agent registered pursuant to Section 17A(c) of the Act to perform the function of a transfer agent with respect to such securities.”<sup>3</sup>

In addition, Rule 301(b) of Regulation Crowdfunding requires intermediaries to have a “reasonable basis” for believing that an issuer has established means to keep accurate records of the holders of the securities it would offer and sell. In adopting the rule, the Commission created a non-exclusive safe harbor for the intermediary if an issuer “has engaged the services of a transfer agent that is registered under Section 17A of the Exchange Act.”<sup>4</sup>

These rules provide relief from certain requirements if issuers retain a transfer agent. They do not provide that relief to issuers that retain other regulated entities that provide substantially the same services as transfer agents relating to shareholder records.

The Commission’s rationale in providing the relief upon retention of a transfer agent is the role transfer agents play in maintaining accurate shareholder records.<sup>5</sup> However, as the Commission noted in the Regulation Crowdfunding Release, it “continue[s] to believe that accurate recordkeeping can be accomplished by diligent issuers or through a variety of third parties.” Indeed, as the Commission notes in both the Transfer Agent Release and the Regulation Crowdfunding Release, entities other than registered transfer agents perform essentially the same services that transfer agents perform.

For instance, in the Transfer Agent Concept Release, the Commission stated:

The transfer and recordkeeping services provided to beneficial owners by banks and brokers are largely identical to the recordkeeping and transfer services provided with respect to registered owners by registered transfer agents. For example, banks and brokers often maintain accountholder information details, process transfers and other changes to accounts, provide securityholder services such as call center support, and provide account statements showing ownership positions for their beneficial owner customers.<sup>6</sup>

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<sup>3</sup> 17 CFR 240.12g5-1(a)(7).

<sup>4</sup> 17 CFR 227.301(b).

<sup>5</sup> See Regulation A Final Rules Release, Release Nos. 33-9741, 34-74578 ( at 59 (“March 22, 2015) AT 59 (“...we believe the additional requirement that Regulation A issuers use a registered transfer agent will provide an important investor protection in this context. The use of a transfer agent . . . will provide added comfort that securityholder records and secondary trades will be handled accurately”); Regulation Crowdfunding Final Rule Release at 172-73, 332-33 (“... we believe that conditioning the 12(g) exemption on crowdfunding issuers using a registered transfer agent will provide an important investor protection in this context. . . . We note that a registered transfer agent is a regulated entity with experience in maintaining accurate shareholder records, and its use will help to ensure that securityholder records and secondary trades will be handled accurately”).

<sup>6</sup> Transfer Agent Concept release at 156.

Moreover, as the Commission noted in the Transfer Agent Concept Release, entities other than transfer agents typically perform shareholder recordkeeping activities on a wider scale than transfer agents perform:

Although transfer agents provide critical recordkeeping and transfer services to registered owners, they generally do not have visibility beyond the master securityholder file and therefore rarely provide recordkeeping and transfer services to beneficial owners who hold in street name. Instead, recordkeeping and transfer services usually are provided to beneficial owners by the intermediary through whom the beneficial owner purchased the securities, usually a broker-dealer or bank. Because many securityholders elect to hold exchange-traded securities in street name, many issuers have significantly more beneficial owners than registered owners. As a result, broker-dealers, banks, and other intermediaries may provide recordkeeping and transfer services to a larger portion of a given issuer's shareholder base – the intermediaries' customers – than the registered transfer agent for that issuer.

Not only do broker-dealers perform the same recordkeeping services as registered transfer agents and on a wider scale, but broker-dealers and, in particular, clearing brokers like Folio, are subject to much more extensive regulation than transfer agents. The transfer agent rules relate primarily to routine transfers of certificated equity and debt securities and generally cover three areas: (1) registration and annual reporting requirements; (2) timing and certain notice and reporting requirements related to securities transaction processing; and (3) recordkeeping and record retention rules and safeguarding requirements for securities and funds.<sup>7</sup> As the Commission notes, the rules applying to transfer agents have been largely unmodified since they were adopted.<sup>8</sup>

By contrast, the Exchange Act, the rules of the SEC, and the rules of FINRA subject clearing firms like Folio to a much more extensive scheme of regulation. The regulatory scheme includes provisions relating to operational capability, minimum net capital, recordkeeping requirements, financial reporting requirements, rules requiring the safeguarding of customer funds and securities, provisions regarding the creation and maintenance of specified books and records, anti-fraud and anti-manipulation provisions, anti-money laundering regulations, rules requiring adequate supervisory protections, provisions regarding privacy protections and limits on the use of information, among others.

We submit therefore that the regulatory requirements placed on clearing brokers provide at least the same degree of investor protection relating to the maintenance of accurate shareholder records as the transfer agent rules provide. The Commission raises a concern in the Transfer Agent Concept Release that broker-dealers would not be subject to the specific transfer agent rules and thus may not provide equivalent investor protections in maintaining

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<sup>7</sup> Transfer Agent Concept Release at 48.

<sup>8</sup> Transfer Agent Concept Release at 49 (“... the core registration, processing, recordkeeping, and safeguarding rules remain substantially unchanged”).

shareholder records.<sup>9</sup> However, the Commission acknowledges that the broker-dealer recordkeeping requirements in Rule 17a-3 cover information relating to securityholder accounts. And, of course, those provisions require that such records be accurate.

### **Conclusion**

For the reasons stated above, we urge the Commission to consider allowing issuers to obtain the same relief provided by Rules 12g5-1(a)(7), 12g-6 and 301(b) if issuers retain a clearing broker rather than a transfer agent to perform shareholder recordkeeping services.

Very truly yours,

Michael J. Hogan  
CEO & President  
FOLIO*fn* Investments, Inc.

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<sup>9</sup> Transfer Agent Concept release at 157-58.