

April 14, 2016

Secretary
Securities and Exchange Commission
100 F Street NE.,
Washington, DC 20549-1090
Submitted to: rule-comments@sec.gov

Re: Comments on Concept Release: Transfer Agent Regulations
Release No. 34-76743; File No. S7-27-15

Dear Sir or Madam:

The American Retirement Association (the “ARA”) and the Council of Independent 401(k) Recordkeepers (“CIkR”) wish to comment on the above-referenced “Advance Notice of Proposed Rulemaking, Concept Release, and Request for Comment on Transfer Agent Regulations” (the “Release”) published by the Securities and Exchange Commission (the “Commission”) on December 22, 2015. In particular, our comments relate to certain points raised in the Release regarding the administration of employer-sponsored retirement plans that are generally subject to the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) (“Retirement Plans” or “Plans”).¹

The ARA is a national organization of more than 25,000 members who provide consulting and administrative services to American workers, savers and sponsors of Retirement Plans and individual retirement accounts. ARA members are a diverse group of Retirement Plan service providers, including financial advisers, consultants, administrators, actuaries, accountants and attorneys. The ARA is also the coordinating entity for its underlying affiliate organizations, including the American Society of Pension Professionals and Actuaries (“ASPPA”), the National Association of Plan Advisors, the National Tax-deferred Savings Association and the ASPPA College of Pension Actuaries. ARA members are united in a common dedication to America’s private retirement system.

CIkR, a partner organization of ASPPA, is a national organization of 401(k) Plan service providers. CIkR members are unique in that they are primarily in the business of providing services to Retirement Plans, as compared with financial services companies that primarily are in the business of selling investment products to the broader market. As a consequence, the independent members of CIkR are able to offer Retirement Plan sponsors and participants (via their services platforms) a wide variety of investment options from various financial services companies without an inherent conflict of interest. By focusing on efficient Retirement Plan operations and innovative Retirement Plan sponsor and participant services, CIkR members are a

¹ For simplicity, we are referring to participant-directed “401(k)” Plans. We note that most 401(k) Plans are subject to ERISA, though there are a few exceptions. Generally, the procedures discussed here apply to non-ERISA Plans, as well.

significant and important segment of the Retirement Plan service provider marketplace. Collectively, the members of CIkR provide services to more than 70,000 Retirement Plans covering three million Americans with approximately \$130 billion in retirement assets.

I. Summary

The recordkeeping and other services performed by CIkR members fall under the category of what Release Section VII.E describes as “Plan Administration” services. More specifically, Section VII.E.1. makes it clear that “[t]he majority of Plan Administrators that provide services for Retirement Plans . . . do not perform statutory transfer agent functions.” ARA and CIkR agree with this statement and believe that it is imperative that this conclusion should be clearly and unambiguously confirmed by any revised transfer agent regulations.

In addition, Section VII.E.3. discusses certain Plan Administration activities such as netting of purchase and sale orders that “may not themselves implicate transfer agent requirements, but nonetheless may trigger broker-dealer regulatory requirements.” We are concerned that the discussion which follows this statement – though intended to focus on activities performed by persons who *are* transfer agents – may unintentionally sweep in Retirement Plan recordkeepers who *are not* transfer agents and signal a change in the long-standing position of Commission staff that activities typically performed by Retirement Plan recordkeepers by themselves would not trigger broker-dealer registration. We ask that the Commission make it clear that the discussion of broker activities is not intended to reflect any new position but merely to serve as a reminder of existing interpretations.

II. Background - Recordkeeper Functions

To understand the role of a Retirement Plan recordkeeper, it is important to first explain the role of Retirement Plan “sponsor,” “administrator,” “trustee” and “custodian” under ERISA. A Retirement Plan sponsor is the employer that established the Retirement Plan.² A sponsor will also typically act as an “administrator,”³ as well as a “named fiduciary.”⁴ Persons who serve these functions are the fiduciaries primarily responsible for the administration of the Retirement Plan, including the selection and monitoring of service providers, such as recordkeepers. As required under ERISA and the Internal Revenue Code of 1986, as amended (the “Code”), a Retirement Plan must also have a “trustee.”⁵ Typically, a Retirement Plan trustee is “directed” by participants as to the investment of the participants’ accounts.⁶ If the trustee is a state or federally regulated bank or trust company, it may also act as the Retirement Plan’s custodian; if the trustee is an individual or committee, a separate corporate custodian generally will be engaged. In certain instances, the role of custodian may be assigned or further delegated to a broker-dealer registered under the Securities Exchange Act of 1934, as amended (the “Exchange Act”). Because of their involvement

² See Section 3(16)(B) of ERISA.

³ See Section 3(16)(A) of ERISA. The role of the ERISA Section 3(16) fiduciary administrator can be, and sometimes is, assigned to a third party, but this is separate and distinct from, and does not relate to, the functions of the recordkeeper.

⁴ “Named fiduciary” is defined in Section 402(a)(2) of ERISA.

⁵ Limited exceptions exist, *e.g.*, if all Retirement Plan assets are invested via insurance contracts, but these arrangements are not relevant here.

⁶ In this example, participant accounts represent interests in the trust assets.

in the execution, clearing and settlement of mutual fund transactions (as described below), we refer to the corporate trustee and custodian, individually and collectively, as an “Intermediary” – the Intermediary will always be an exempt bank or registered broker with authority to effect or execute securities transactions.

ERISA imposes various administrative requirements on Retirement Plan sponsors and administrators. For example, Section 209 of ERISA compels employers to maintain records of the interests held by employees participating in the Retirement Plan in a manner that is “sufficient to determine the benefits due or which may become due to such employees.” Due to resource constraints, sponsors and administrators may outsource to recordkeepers⁷ various ERISA-required functions.⁸ In other words, the essence of the recordkeeper’s role is that it merely facilitates the performance of Retirement Plan sponsor/administrator functions. The following are examples of such functions:

- Processing payroll data to facilitate the allocation of contributions properly among participant accounts.
- Gathering and transmitting investment transaction requests from participants and updating participant records upon settlement of these transactions (as more fully described below).
- Delivering prospectuses to participants.
- Communicating with participants/distributing Retirement Plan information and investment education materials at the direction of the sponsor.

Recordkeepers are subject to examination, subpoena and enforcement authority of the Department of Labor (“DOL”).⁹

Recordkeepers’ Involvement in Mutual Fund Transactions

Retirement Plan sponsors typically choose the investment options that will be offered to participants. These options may include mutual funds, commingled trusts, insurance contracts, single customer managed accounts and other investment alternatives. Because mutual funds are among the most common investment options offered under Retirement Plans, recordkeepers are expected to efficiently handle participant directions (as well as certain transactions initiated by employers) involving mutual funds in order to minimize Plan administrative expenses.

While a recordkeeper will play an important role in minimizing Retirement Plan administrative expenses, it has a *limited* role in the execution, clearing and settlement of mutual fund transactions, which can be summarized as follows:

⁷ A Retirement Plan sponsor may also retain a non-fiduciary administrative consultant service provider, typically called a “third party administrator” or “TPA,” to assist the Retirement Plan sponsor primarily in administering benefits in accordance with the terms of the Retirement Plan document, the Code and ERISA. A TPA is not a fiduciary and should not be confused with the fiduciary role of the Retirement Plan sponsor as “administrator” under ERISA and should not be confused with that of a recordkeeper. *The recordkeeper and TPA may be one and the same entity.* The functions of recordkeeper and TPA collectively appear to be those described by the Release as “Plan Administration” services.

⁸ Privity of contract for the performance of recordkeeping services is between the Retirement Plan sponsor/administrator and the recordkeeper.

⁹ The U.S. Department of Labor, the federal agency primarily responsible for enforcing ERISA, has broad authority under Section 504 of ERISA to examine Plan service providers, and it frequently exercises these powers to examine recordkeepers.

- A recordkeeper processes investment instructions from participants to buy or sell a mutual fund security. For example, a recordkeeper may accept and record a participant instruction via telephone, voice response system, paper or the internet; and,
- A recordkeeper prepares a daily aggregated trade file on behalf of the Retirement Plan, which is generally processed in one of two ways:
 - The recordkeeper submits the aggregated trade file to an Intermediary (as noted above, typically the Plan’s trustee or custodian). The Intermediary will receive and confirm the trade file, verify its information and transmit the trade order to the National Securities Clearing Corporation (“NSCC”) (directly or via another Intermediary that is an NSCC member); in some cases, if the Intermediary receives trade files from multiple Retirement Plans, the Intermediary may “net” those orders and submit a single (omnibus) trade order; or,
 - The recordkeeper submits the aggregated trade orders directly to NSCC with the recordkeeper’s own control numbers, with a copy to the Intermediary and subject to the Intermediary’s oversight.

In both situations, NSCC will verify the information and submit a trade order to each mutual fund’s transfer agent (NSCC may or may not further “net” trade orders). Upon confirmation from the mutual fund’s transfer agent, settlement will occur between the Intermediary and the mutual fund’s transfer agent via NSCC. As a final step, the Intermediary will forward a copy of the trade settlement to the recordkeeper so that the recordkeeper may update the participant account information on behalf of the Retirement Plan sponsor.

The Retirement Plan’s trustee is at all times legal owner of mutual fund shares. If the Intermediary is not the Retirement Plan’s trustee, the Intermediary is the record owner of the assets “for the benefit of” (“FBO”) the trust/trustee (or FBO multiple trusts/trustees).

Importantly, a recordkeeper does *not* have the authority or power to transfer record ownership of mutual fund shares or, in any practical sense, facilitate the transfer of rights associated with share ownership; its role is simply to “track” participants’ interests for the Plan. Moreover, a recordkeeper does *not* transmit or otherwise handle cash or securities. Cash contributions from the Retirement Plan sponsor or participants, and cash required to make distributions to participants (*e.g.*, distributions, loans, *etc.*), for example, flow only through the Intermediary.¹⁰ The cash required to settle a trade order flows only to/from the Intermediary through NSCC to the mutual fund’s transfer agent.

When a participant orders the purchase or sale of a mutual fund (or other) security, the sponsor will transmit payroll/contribution information to the recordkeeper to enable the recordkeeper to account for the cash to be credited to each participant’s account and made available for investment by the participant. However, recordkeepers do *not* receive or hold any cash, securities or other property on behalf of the Retirement Plan.

It is also worth noting that recordkeepers do not in any sense “net” transactions as part of the clearance and settlement systems. For example, recordkeepers do *not* participate in NSCC’s Continuous Net Settlement System (“CNS”). While a recordkeeper may submit an aggregate trade

¹⁰ This can be done via wire, check or ACH drawn on the Intermediary’s account.

order reflecting the net buy/sell directions of individual participants in a single Retirement Plan, (1) this is entirely an intra-Plan activity for the convenience of the Plan sponsor and the Intermediary; (2) it is subject to review and verification by the Intermediary; and (3) it merely reflects the fact that the record owner of the securities is the Retirement Plan, not the individual participants. Moreover, even if a recordkeeper services multiple Retirement Plans and transmits their trade orders to the same Intermediary, under no circumstances does it in any way combine or net trade orders on behalf of those Plans – that remains the sole responsibility of the Intermediary (if it happens at all).

For its services, a recordkeeper may be paid fees for its recordkeeping and other administrative services directly by the Retirement Plan sponsor, by the Plan from unallocated funds, or from participant accounts. A recordkeeper may also be compensated under services agreements with the mutual funds in which Retirement Plan participants direct the investment of their accounts, or with the funds' agents. These fees may be styled as "shareholder services" or "sub-TA" fees but are properly viewed as "sub-accounting" fees to reflect the scope of services performed by the recordkeeper. However, recordkeepers who are not registered broker-dealers do not receive fees in the nature of sales loads, 12b-1 distribution fees or other transaction-based compensation. As noted, the purpose of the sub-accounting fees is to compensate the recordkeeper for undertaking the obligation to maintain individual participant account records at the Retirement Plan-level, under circumstances where the shareholder of record with the mutual fund's transfer agent may be the Retirement Plan's trustee or another Intermediary holding the mutual fund security (i) FBO the individual Retirement Plan trust or (ii) on an omnibus basis FBO multiple customers of the Intermediary.¹¹

We note at the outset that, in general, participant interests in certain types of tax-qualified Retirement Plans, including 401(k) Plans, generally are "exempted securities" under Section 3(a)(12)(A)(iv) of the Exchange Act, and Sections 15(a)(1) and 17A thereunder, generally exempt from registration anyone who effects transactions solely in exempted securities. In this respect, given that the legal owner is the Plan/trust itself, not the individual participants, when a recordkeeper accepts, process and transmits individual participant investment directions to the Intermediary, it is in effect merely tracking participant interests *within the Plan itself*.¹ In other words, the Plan holds an interest in mutual fund shares, the purchase or sale of which is effected by the Plan's Intermediary (in a non-exempt transaction); a participant, on the other hand, holds an interest in the Plan itself in an exempt transaction. The role of the recordkeeper is to track the participant's proportionate interest in the Plan's net share position.

III. Discussion

Recordkeepers Do Not Perform Transfer Agent Functions

Both Congress and the Commission have recognized that the registration of those who perform "transfer agent" functions derives from "a view to facilitating the establishment of a national system for the prompt and accurate clearance and settlement of securities transactions."¹² A transfer agent is statutorily-defined to mean one who (A) countersigns securities upon issuance;

¹¹ Under ERISA Section 408(b)(2) regulations, amounts paid to a recordkeeper by a fund or its agents are disclosed to, and approved by, the Retirement Plan sponsor as indirect compensation for administration services to the Plan.

¹² 40 Fed. Reg. 51182 (Nov. 4, 1975).

(B) monitors the issuance of such securities with a view to preventing unauthorized issuance; (C) registers the transfer of such securities; (D) exchanges or converts such securities; or (E) transfers record ownership of securities by bookkeeping entry without physical issuance of securities certificates.¹³ If one engages in the aforementioned functions, then he is subject to the Commission’s robust regulatory regime. Requirements imposed upon transfer agents include the “turnaround” rule,¹⁴ a duty to disclose certain information¹⁵ and recordkeeping.¹⁶

Transfer agents play a “vital role” in the clearance and settlement of securities.¹⁷ Centrally, transfer agents “cancel stock certificates presented for transfer, issue new stock certificates, and maintain the records reflecting the ownership of securities as agent for the issuer.”¹⁸ As the Commission has recognized, transfer agents have over time broadened their service offerings to include the disbursement of dividends and interest payments, the transmission of security owner communications (*e.g.*, proxy materials and annual reports) and the provision of custody services.¹⁹

Recordkeepers perform *none* of the above functions, and in our view the goals of prompt and accurate clearing and settlement of securities held in street name can be achieved without the needless registration of Plan recordkeepers as transfer agents under Section 17A(c) of the Exchange Act.

As discussed above, the recordkeeper’s role is simply to facilitate the performance of Retirement Plan sponsor/administrator functions. Recordkeepers are not appointed by issuers to perform transfer agent functions.²⁰ Nor are recordkeepers performing transfer agent functions at the behest

¹³ Section 3(a)(25) of the Exchange Act. It is a functional test. As the Commission said, “Thus, an issuer who performs any one or more of the transfer agent functions specified in section 3(a)(25) of the Act with respect to such securities, even if it employs a transfer agent to perform other specified transfer agent functions, would be required to register under the Act. For example, an issuer who engages a transfer agent to countersign certificates, monitor the issuance of certificates, and prepare for the issuer information to enable the issuer to record the transfer of the securities on the corporate security holder records maintained by such issuer would also be required to register, since the issuer would be performing the function of registering the transfer of such securities on the corporation security holder records, a transfer agent function.” 40 Fed Reg. 51182 (Nov. 4, 1975).

¹⁴ 17 C.F.R. § 240.17Ad-2(a).

¹⁵ *See, e.g.*, 17 C.F.R. § 240.17Ad-5(b).

¹⁶ *See e.g.*, 17 C.F.R. § 240.17Ad-6(a)(8), (10).

¹⁷ Release No. 44227 (S.E.C. Release No.), Release No. 34-44227, 74 S.E.C. Docket 1816, 2001 WL 432511 (Apr. 27, 2001).

¹⁸ Release No. 44227 (S.E.C. Release No.), Release No. 34-44227, 74 S.E.C. Docket 1816, 2001 WL 432511 (Apr. 27, 2001).

¹⁹ Release No. 44227 (S.E.C. Release No.), Release No. 34-44227, 74 S.E.C. Docket 1816, 2001 WL 432511 (Apr. 27, 2001).

²⁰ *See* Section 3(a)(25) of the Exchange Act (describing the enumerated transfer agent functions as being performed by “any person who engages on behalf of an issuer of securities or on behalf of itself as an issuer of securities”). *See also*, Release No. 44291 (S.E.C. Release No.), Release No. 34-44291, 2001 WL 1590253 *16 (“In considering the fiduciary capacity role of transfer agents for purposes of the trust and fiduciary activities exception, we must take into account the Exchange Act definition of transfer agent. Under the Exchange Act, a transfer agent is generally any person who engages in certain activities “on behalf of an issuer of securities or on behalf of itself as an issuer of securities” This definition makes clear that the fiduciary relationship of acting as a transfer agent runs primarily to the issuer, and any fiduciary duties that a transfer agent may have to shareholders when carrying out transfer agent activities are the same as the issuer’s duty to the shareholder.”). *See also TD Ameritrade, Inc. v. Nevada Agency and Trust Co.*, 2008 WL 4787138 (D. Nev. 2008) (opining that “a transfer agent is the agent of the issuer of securities”).

of a registered transfer agent.²¹ Rather, recordkeepers are hired by Plan sponsors. As previously noted, recordkeepers help employers to maintain records of the interests held by employees participating in the Plan in a manner that is “sufficient to determine the benefits due or which may become due to such employees” as required by section 209 of ERISA.

Particularly:

- Recordkeepers are responsible for reflecting share ownership by Plan participants at the *Plan* level. Employers transmit payroll/Plan contribution information to their Plan recordkeepers to enable the recordkeeper to account for the cash to be credited to each participant’s account and made available for investment by the participant. Recordkeepers “work closely with the plan trustee to make sure that plan level information reconciles with plan participant level information.”²² Moreover, recordkeepers for 401(k) Plans typically accept contractual responsibility to the Plan or employer for processing payroll data to facilitate the allocation of Plan contributions properly among participant accounts. Recordkeepers also take and transmit investment transaction requests from participants to the Plan’s Intermediary – who is the party actually responsible for transmitting the trade order to the transfer agent – and subsequently update participant records upon settlement of these transactions.
- Recordkeepers do not have control over the records of any issuer or transfer agent (*e.g.*, the master security file, the control book, *etc.*). Any “accounts” over which recordkeepers are responsible are the 401(k) Plan’s accounts, not the record ownership of the mutual fund shares. Recordkeepers’ principal relationship is with that of the Plan sponsor.
- Recordkeepers do not handle cash or any other assets.
- Recordkeepers do not countersign securities, have any responsibility for monitoring the issuance of mutual fund shares, register the transfer of mutual fund shares or exchange or convert mutual fund shares.
- Recordkeepers are not integral to the clearance and settlement of securities transactions. Even if a recordkeeper submits an aggregate trade order, this submission is strictly out of convenience of the Plan sponsor and the Intermediary, and is always subject to the review and verification by the Intermediary (*i.e.*, the Intermediary is legally liable for the trade order). Moreover, the order merely reflects the fact that the record owner of the securities is the Retirement Plan, not the individual participants. Lastly, recordkeepers do not “submit [] net trade order[s] to the transfer agent of the mutual fund.” Rather, only an

²¹ See, *e.g.*, 17 C.F.R. § 240.17Ad-6(a)(8), (10) (Recordkeeping requirements also exist for transfer agents. For example, a registered transfer must maintain “[a]ny document, resolution, contract, appointment or other writing, any supporting document, concerning the appointment and the termination of such appointment of such registered transfer agent to act in any capacity for any issue on behalf of the issuer, on behalf of itself as the issuer or on behalf of any person who was engaged by the issuer to act on behalf of the issuer” as well as “[a] copy of any transfer journal and registrar journal prepared by such registered transfer agent....”); SEC No-Action Letter, *Boston Financial Data Services, Incorporated* (pub. avail. Sept. 2, 1978) (“It is the Division’s view that Section 3(a)(25) and 17A(c)(1) of the Act evidence an intent by Congress to require registration as a transfer agent not only by any entity which is a named transfer agent but also by any entity which performs any of the statutory transfer agent functions for the ultimate benefit of the issuer and its shareholders. It would be inconsistent with remedial legislation designed to achieve the prompt and accurate clearance and settlement of securities transactions, including the transfer of record ownership and the [safeguarding] of securities and funds related thereto, if the phrase ‘on behalf of an issuer of securities’ were restricted between Boston and an issuer.”); accord SEC No-Action Letter *Buckingham Financial Services Incorporated* (pub avail. May 28, 1978).

²² OCC Handbook, Retirement Plan Products and Services (Feb. 2014), p. 4.

Intermediary or NSCC (acting as an Intermediary) does so.

This last point is particularly salient. Recordkeepers are too far removed from the clearance and settlement of securities to justify registration as transfer agents. It is imperative to understand that, subject to very narrow exceptions (as described below), Plan participants are considered *trust* beneficiaries and not registered or beneficial owners of the mutual fund shares purchased in respect of a Plan. This means that the accounts the recordkeeper maintains are to facilitate the smooth administration of the Plan and its *trust* and do not capture either record or beneficial ownership of the mutual fund *securities*. See the discussion below regarding “exempted securities.”²³

Though the Commission has at times conflated the distribution of shareholder information with “true” transfer agent functions (*i.e.*, those enumerated in Section 3(a)(25) of the Exchange Act),²⁴ we do not think the distribution of prospectuses by recordkeepers to Plan participants provides a basis for transfer agent registration. The distribution of such information is on behalf of the Plan sponsor, not an issuer or transfer agent. Moreover, communications to participants arise out of the Plan sponsor’s obligations under ERISA, not the securities laws. Because the participants hold beneficial interests in the *trust*, and not the securities for which the trust is the legal owner, we do not think it is appropriate for the Commission to regulate recordkeepers—by reason of the transfer agent rules—in respect of conduct taken at the Plan level far removed from the specter of conduct contemplated in Section 3(a)(25) of the Exchange Act. As we noted above, recordkeepers are subject to examination, subpoena and enforcement authority of the DOL with respect to services they provide to the Plan and the Plan sponsor. We urge the Commission to defer to the DOL and ERISA’s statutory scheme for actions taken at the Plan level, which is the case with recordkeeper services.

In our view, needless transfer agent registration would harm the 401(k) Plan market. Specifically, if Plan recordkeepers are required to register as transfer agents, they will potentially become subject to many unnecessary requirements, including:

- Updating of Form TA-1 (Rule 17Ac2-1(c) and Form TA-1)
- Annual report on Form TA-2 (Rule 17Ac2-2)
- Responses to written inquiries and requests (Rule 17Ad-5)

²³ In effect, participants do not have ownership interests in the Plan’s securities as such, or any direct claim to those securities, but have account balances that are *valued* in relation to specified assets owned by the Plan and its trust. In this respect, the fact that participants commonly may direct the investment of their individual accounts is something of a distraction here – it is not a necessary requirement of a 401(k) plan but a permissive concept under ERISA. Thus, it is possible (and not unknown) for all investment decisions to be made solely by Plan fiduciaries without input from participants; nonetheless, the recordkeeper is required to track each participant’s account balance by reference to an allocable share of the Plan’s assets. Moreover, it is possible for a 401(k) Plan to have unallocated investment assets derived from forfeitures of unvested participant accounts or “extraordinary” events, further evidence that the actual “owner” of the assets is the Plan.

²⁴ We express concern that the Commission’s attempt to characterize activity, which is not set forth in Section 3(a)(25) of the Exchange Act, as transfer agent in nature, is beyond the Commission’s rulemaking authority. See, *e.g.*, *U.S. v. Haggard Apparel Co.*, 526 U.S. 380, 392 (1999) (“In the process of considering a regulation in relation to specific factual situations, a court may conclude the regulation is inconsistent with the statutory language or is an unreasonable implementation of it. In those instances, the regulation will not control.”) and *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013) (“No matter how it is framed, the question a court faces when confronted with an agency’s interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority.*”)

- Recordkeeping and record retention requirements (Rules 17Ad-6 and Rule 17Ad-7)
- Reporting Requirements (Rule 17Ad-11)
- Annual study and audit (Rule 17Ad-13)
- Signature guarantees (Rule 17Ad-15)

These requirements would impose additional costs on Plan recordkeepers, who would be forced to pass these costs along to their 401(k) Plan customers. It could also drive many independent recordkeepers out of business due to price sensitivity and small margins in the industry.

This could have significant unintended consequences. Independent recordkeepers play a significant role in promoting open architecture Plan service models, which allow Plans to offer investments from different mutual fund complexes. The primary competitors of independent recordkeepers are affiliated with particular mutual fund families, and in the absence of competition, they would have a greater ability to limit the fund universe available through their recordkeeping platforms to affiliated funds. Moreover, if independent recordkeepers are forced to exit the business, small and middle market employers will have greater difficulty finding service providers willing to take the time to provide the level of practical assistance they need to establish and maintain Retirement Plans for their employees.

Recordkeepers Do Not Perform Broker Functions

In addition to raising the question of whether Plan administrators including recordkeepers may perform transfer agent functions, the Release at E.3. further raises the issue of broker-dealer registration. Specifically, as relevant here, the Release states that:

3. Potential Broker-Dealer Registration Issues

As described above, Plan Administrators, TPAs, and Mutual Fund Transfer Agents all provide some level of transaction execution and order routing services. The specific services may vary depending on the Plan or firm, but in general, administrators that provide transaction execution services will handle customer funds and securities and may provide some level of netting, which is the process of offsetting expected deliveries and payments against expected receipts in order to reduce the amount of cash and securities to be moved. ***For example, some administrators for employer-sponsored Retirement Plans offset purchase and sale transactions in the same target mutual fund by different participants in the Plan and submit a net order to the transfer agent of the mutual fund.*** Netting is a function commonly performed by clearing agencies and may also be performed by broker-dealers for customers holding in street name, but is not among the core functions enumerated in Exchange Act Section 3(a)(25) performed by registered transfer agents. ***Hence, netting and other execution services may not themselves implicate transfer agent requirements, but nonetheless may trigger broker-dealer regulatory requirements.*** [Emphasis added.]

* * *

The Commission staff has stated its view that it will not recommend enforcement action where a TPA performs some “clerical and ministerial” activities without registering as a broker, subject to the conditions that, among things, the TPA refrain from netting or

matching orders. This guidance is consistent with long-standing views on what constitutes broker activity. The Commission also notes that its staff has taken the position in connection with no-action relief that, depending on the facts and circumstances, the performance of some or all of the administrative activities discussed in this section are also performed by entities that have registered with the Commission as brokers for such purposes. Transfer agents that solicit purchase and sale orders, accept orders directly from investors, advertise services directly to investors, and make investment recommendations, also raise broker-dealer registration issues.

In addition, Request for Comment #133 asks the following:

Should the Commission amend the rules so that transfer agents performing specific activities are exempt from broker-dealer registration only if they are (i) registered with the Commission as a transfer agent, (ii) limit their activities to those specified in the general rule, and/or (iii) agree to abide by certain other conditions designed to protect investors and limit the risks associated with those activities? Why or why not? ***Should the Commission require broker-dealer registration for any activities beyond what is permitted or conducted by an entity that is not registered with the Commission as a transfer agent under such an exemption? Why or why not? Please explain and provide supporting evidence regarding any potential effects.*** [Emphasis added.]

The Release language above – and the highlighted language more specifically – is particularly troubling to CIKR and its members for several reasons:

- First, Commission staff have provided effective and workable guidance regarding the circumstances under which recordkeepers and other Plan administrators may be engaged in functions that require them to register as broker-dealers. The Commission has offered no basis for modifying or rescinding its prior guidance. In particular, as discussed more fully below, to suggest that when a recordkeeper offsets or aggregates participant investment directions *within* a single Plan, and submits those directions to an Intermediary, the recordkeeper is effectively “submit[ing] a net trade order to the transfer agent of the mutual fund” is not accurate as a matter of law or of fact.
- Second, the stated purpose of the Release is “to seek public comment regarding the Commission’s transfer agent rules.” Release, Summary, at *1. Although it may be appropriate in that context for the Commission to consider whether other (non-transfer agent) functions performed by transfer agents may require that they *also* register as brokers, the Release does not provide adequate rationale or notice for purporting to expand broker registration to persons – such as recordkeepers – who do not perform transfer agent functions (see above). In this respect, we read Request for Comment #133 as only asking for comment on whether registered transfer agents who perform certain broker functions should or should not be exempt from broker registration, with absolutely no implication for other persons. We strongly encourage the Commission to confirm that this is the case.

Legal Background

In general, under the Exchange Act, a “broker” is “any person engaged in the business of effecting transactions in securities for the account of others.” Section 3(a)(4) of the Exchange Act. Section 15(a) of the Exchange Act generally requires that any person who is a broker must register with

the Commission, unless the person is an individual associated with a registered broker. Registered brokers generally must be members of a self-regulatory organization (“SRO”), such as the Financial Industry Regulatory Authority, Inc. (“FINRA” and formerly, the National Association of Securities Dealers or “NASD”).

Whether a person is a broker depends on the activities that the person performs. The Commission staff has explained that, generally, a person might need to register as a broker if the person would answer “yes” to any of the following:

- Do you participate in important parts of a securities transaction, including solicitation, negotiation or execution of the transaction?
- Does your compensation for participating in the transaction depend upon or is it related to the outcome or size of the transaction or deal? Do you receive trailing commissions, such as 12b-1 fees? Do you receive other transaction-related compensation?
- Are you otherwise engaged in the business of effecting or facilitating securities transactions?
- Do you handle the securities or funds of others in connection with securities transactions?²⁵

On the other hand, activities that are purely “clerical and ministerial” or that otherwise do not relate to effecting securities transactions may not require registration.

Certain Commission staff no-action letters and other guidance specifically address whether the activities of third-party administrators and other persons providing employee benefit Plan services require broker registration:

- In *Universal Pensions, Inc.* (pub. avail. Jan. 30, 1998) (the “UPI Letter”), the Commission staff considered whether Universal Pensions, Inc. (“UPI”), a third-party administrator firm responsible for receiving and processing participant investment instructions and other Plan administrative services was required to register as a broker and granted a no-action position, noting in particular that UPI would not (1) handle customer funds and securities, (2) net or match orders *among Plan clients* or (3) provide investment advice.
- In *Total Benefit Communications* (pub. avail. Nov. 6, 2001) (the “TBC Letter”), the Commission staff considered whether persons conducting Plan enrollment meetings might be required to register as brokers. The staff concluded that Total Benefit Communications (“TBC”) and its employees could provide enrollment meeting services without broker registration.
- In *MII Life, Inc.* (pub. avail. May 1, 1986), the Commission staff took the position that salaried employees of the applicant who marketed to employers and employees a 401(k) Plan that would invest in insurance or mutual funds could, without registering, communicate general Plan information and information about Plan investment options but could not provide individualized advice to participants.
- The Commission brought an enforcement action against Transcorp Pension Services (“Transcorp”), which served as a pension administrator for self-directed IRAs and qualified

²⁵ See SEC Division of Market Regulation, Guide to Broker-Dealer Registration (Apr. 2008), available at www.sec.gov/divisions/marketreg/bdguide.htm.

Retirement Plans. *In the Matter of Transcorp Pension Servs., Inc.*, 52 S.E.C. 819 (June 4, 1996). Transcorp maintained a master custodial account with a bank, into which it deposited client funds. Transcorp, not the custodial bank, was responsible for maintaining records of the transactions and the ownership interests in the master custodial account. Without registering as a broker-dealer, Transcorp would, upon instruction from the client, withdraw and transfer funds for the purchase of securities, and would charge a transaction fee for the service.

We discuss below these and other interpretations that may be relevant in determining whether the activities performed by recordkeepers and their employees may require registration as a broker-dealer. First we discuss the types of activities that generally should not require registration, including activities that may not involve the “effecting of or facilitating securities transactions” or may be solely clerical and ministerial activities. Second, we will discuss activities that could require broker registration, and point out that unregistered CIkR member recordkeepers generally do not perform these functions. Finally, we discuss that the exception for registration for exempted securities may also provide relief from the registration requirement.

Activities that Do Not Require Registration

In general, the Commission has taken the position that registration is not required where the person in question performed activities that were either generally “clerical and ministerial” *or* did not involve securities transactions at all, *e.g.*, Plan design services.

A person who performs only “clerical and ministerial” services in connection with the processing of securities transactions should not need to register as a broker. Clerical and ministerial activities may include (depending on the facts and circumstances): maintaining shareholder records for a mutual fund, processing investments and redemptions for mutual fund shares, data processing and mailing information to shareholders. SEC No-Action Letter, *Investment Company Institute* (pub. avail. June 13, 1973); SEC No-Action Letter, *Applied Financial Systems* (pub. avail. Sept. 25, 1971); SEC No-Action Letter, *Dreyfus Group Equity Fund* (pub. avail. June 1, 1971). *See also* NASD Conduct Rule 1060(a)(1) (persons associated with a NASD member whose functions are solely and exclusively clerical and ministerial are not required to be registered with NASD). Importantly, in this respect, 401(k) Plan participants are not themselves shareholders but merely hold interests “through” the actual shareholder of record, the Plan (and trust).

In the UPI Letter, the Commission staff specifically considered whether a Plan administrator/recordkeeper performs activities that require broker registration. UPI provided Plan administrative services, including recordkeeping, in an alliance with a state-chartered trust company. Together, UPI and the trust company provided a bundled package of trust, custody, recordkeeping and administrative services to Plans. Plan clients were referred to UPI by registered brokers, who were responsible for marketing the investment options (usually mutual funds) offered under the Plans. UPI's administrative services included —

- Plan design and administration services, such as prototype Plan documents, Plan installation and set-up, participant recordkeeping, benefits processing and participant statements;

- providing participants access to automated telephone voice response, call center and internet services to permit participants to obtain account balance information, submit investment instructions and request Plan information;
- receiving and processing participant investment instructions, creating Plan purchase or redemption orders for mutual funds, and forwarding orders to the trust company for execution;
- under service agreements with mutual funds, being authorized to accept orders from participants for purposes of determining the price at which the orders would be effected; and
- under service agreements with mutual funds, receiving asset-based fees (which would be disclosed to Plans) for services including recordkeeping and reporting, arranging for delivery of prospectus materials and other shareholder information and responding to administrative questions from Plan fiduciaries and participants.

The Commission staff agreed that broker registration was *not* required, noting in particular that, based on the facts described, UPI would not: (1) handle customer funds or securities; (2) net or match orders; or (3) provide investment advice – see below.

Activities that May Require Registration

The Commission and its staff, as well as FINRA, have indicated that certain activities generally may require broker registration.

However, CIKR’s Unregistered Recordkeeper Members Generally Do Not Engage in any of the Following Activities:

- Soliciting or recommending securities transactions: In general, recommending securities and soliciting securities transactions are activities that require broker registration. Although the question of whether an individual solicits or recommends securities transactions is complicated, Commission staff have recognized that the core activities performed by recordkeepers do not involve recommending or soliciting securities transactions.

Thus, for example, in the TBC Letter mentioned above, Commission staff concluded that TBC and its employees could provide enrollment meeting services without broker registration, where TBC employees would only explain Plan terms and benefits, discuss the benefits of Plan participation and provide descriptions of Plan investment alternatives based on materials provided by a registered broker or other investment provider. TBC only provided short-term employee benefit staffing services, and neither TBC nor any of its employees would receive transaction-based compensation (rather, TBC would charge only based on time spent to prepare for and conduct meetings).

Further, in no-action letters that address the definition of “investment advice” for purposes of the Investment Advisers Act of 1940 (“Advisers Act”), the Division of Investment Management staff recognized that disseminating general financial and Plan information (including objective information about Plan investment options, underlying assets, risk and return characteristics and investment objective and policy), as described by safe harbors

under U.S. Department of Labor Interpretative Bulletin (“IB”) 96-1, generally would not constitute investment advice.²⁶

With respect to its conclusion that UPI would not provide investment advice, the Commission staff specifically noted that UPI would not recommend any mutual funds or provide any other investment advisory services to the Plans, and all advisory services would be provided by registered brokers that were not affiliated with UPI. In addition, the staff noted that UPI telephone operators would be available to assist participants with questions about Plan administration and about the automated telephone system but would not “answer any questions about the mutual funds in which plan assets may be invested, discuss the merits of any security or type of security, or handle questions that might require familiarity with securities or the securities industry.” All such questions would be referred to a registered broker-dealer.

CIKR’s Unregistered Recordkeeper Members Do Not Recommend or Solicit Securities Transactions.

- Receiving transaction-related compensation: By itself, the receipt of transaction-related compensation may be sufficient for the Commission to require broker registration because registration helps to ensure that persons with a “salesman's stake” in a securities transaction operate in a manner consistent with customer protection standards governing broker-dealers and their associated persons, such as sales practice rules.²⁷ Moreover, the Commission staff takes an expansive view of “transaction-related compensation,” by describing transaction-related compensation as any compensation that depends upon, or is related to, the outcome or size of a transaction or deal, including trailing commissions, such as 12b-1 fees.²⁸

²⁶ See Employer-Sponsors of Defined Contribution Plans, at n.1 (Letter to Assistant Secretary of Labor Olena Berg) (pub. avail. Feb. 22, 1996) (“as a general matter, information that simply describes or explains the various investment options available through a Plan, without including any analysis or recommendation with respect to those options, would not constitute 'investment advice' as that term is used in the Advisers Act”) (the “Olena Berg Letter”). Similarly, in a no-action letter issued to Automatic Data Processing, Inc. (“ADP”) (pub. avail. Apr. 22, 1991), the Division of Investment Management granted a no-action position agreeing that a Plan recordkeeper was not required to register as an investment adviser even though its employees might participate in making presentations to employees eligible to participate in a Plan, including explaining the administrative aspects of the Plan, describing the advantages of enrolling in the Plan, and distributing information on available Plan investment choices.

Only the staff of the Division of Investment Management provided a publicly available response in connection with the ADP no-action letter. Although it is not entirely clear, the fact that the Division of Market Regulation did not respond may suggest that staff did not believe that ADP's activities raised any new issues under the Exchange Act's broker registration requirements, particularly in light of no-action positions previously taken in no-action letters issued to North Shore Savings & Loan (pub. avail. June 7, 1985) and MII Life, Inc. (pub. avail. May 1, 1986).

²⁷ See SEC No-Action Letter, *1st Global, Inc.* (pub. avail. May 7, 2001); SEC No-Action Letter, *Birchtree Financial Services* (pub. avail. Sept. 22, 1998). See also SEC No-Action Letter, *Brumberg, Mackey & Wall, P.L.C.* (May 17, 2010) (denial of no-action request); SEC No-Action Letter, *Century Business Services, Inc. and CBIZ Financial Solutions, Inc.* (pub. avail. Mar. 1, 2002) (denial of no-action request) (accounting firms or other entities that employ individuals who are registered representatives of a third party broker may not receive commissions or other compensation from the third party based on their employees' activities).

²⁸ See SEC Division of Market Regulation, *Guide to Broker-Dealer Registration* (Apr. 2008). This describes fees paid based on the number of securities transactions, but also includes (in the case of mutual fund investments)

In the no-action letter to UPI, the Commission staff made particular mention of the fact that UPI would receive no transaction-based compensation. Rather, UPI received administrative fees that were based either on a percentage of the average daily net asset value of mutual funds shares held by UPI's Plan clients, or on a per Plan account bases. In addition, UPI would disclose to Plan participants that, under this arrangement, it would receive fees from the mutual funds in which the participants invested.

CIkR's Unregistered Recordkeeper Members Do Not Receive Transaction-Based Compensation.

- Having Control of or Handling Client Funds and Securities. The Commission has long taken the position that activities involving custody or control over customer monies or securities in connection with securities transactions may require registration as a broker-dealer.²⁹

CIkR's Unregistered Recordkeeper Members Do Not Have Custody or Control Over, or Otherwise Handle, Customer Monies or Securities.³⁰

- Processing, aggregating and netting orders. While there is some authority holding that taking and transmitting orders may be a “clerical and ministerial” activity that does not

“asset-based” fees, such as 12b-1 fees, that are determined as a percentage of assets invested in securities. FINRA rules generally treat asset-based fees paid by a mutual fund as compensation for sales-related or “distribution” services if the fees exceed 0.25% of the fund's average annual net assets. See NASD Conduct Rule 2830(d). See also SEC No-Action Letter, *Investment Company Institute* (pub. avail. Aug. 22, 1994) (Commission staff explains that any fund paying a 12b-1 fee exceeding 0.25% may not represent the fund as “no-load”). FINRA Regulatory Notice 09-34 (June 2009) requests comments on proposed new FINRA Rule 2341, which would replace NASD Rule 2830. Proposed new Rule 2341(d)(4) would incorporate the provisions of NASD Rule 2830(d)(4) without any change. More recently, the Commission has suggested that where Plan administrators receive shareholder servicing fees in compensation for the sale of fund shares, broker dealer registration may be required unless an exemption is available. See Mutual Fund Distribution Fees; Confirmations, Proposed Rule, SEC Rel. No. 33-9128, at n.168 (July 21, 2010).

²⁹ See SEC No-Action Letter, *The Stallion Fund, Inc.* (pub. avail. Sept. 13, 1971) (“Generally speaking, it is our view that if a company acts as an agent for an issuer or investor in connection with the purchase or sale of securities, or maintaining custody or possession of funds or securities at any stage of a securities transaction, it would not only be subject to the broker-dealer regulatory requirements of the Securities Exchange Act of 1934, but possibly other provisions of the federal securities laws.”). See also SEC No-Action Letter, *Clearing Services, Inc.* (pub. avail. Feb. 1, 1972) (performing “back-office” accounting and recordkeeping services required registration where service provider would segregate and hold for safekeeping all of the broker-dealer's securities and the securities of its customers); SEC No-Action Letter, *NARE Life Service Company* (pub. avail. July 26, 1973) (NARE was required to register as a broker-dealer where it would receive payments constituting premiums for variable life insurance policies, deposit those payments into a special bank account in its own name, account for and process the payments and then withdraw the payments and deposit them into the individual accounts of its client insurance companies).

³⁰ In contrast, in the Commission enforcement action against Transcorp, noted above, Transcorp both *handled* the client funds and was responsible for maintaining records of the transactions *and the ownership interests in the master custodial account*. In the *Matter of Transcorp Pension Servs., Inc.*, 52 S.E.C. 819 (June 4, 1996). Where a separate broker-dealer was not involved, Transcorp would, upon instruction from the clients, withdraw client funds from the master custodial account and remit the funds to investment providers with instructions for the purchase of securities. Alternatively, a Transcorp client could initiate a transaction directly with a broker-dealer, and Transcorp would, upon instruction, draw funds from the account, remit them to the broker-dealer and receive the order confirmation.

require broker registration,³¹ we recognize that the activities of order-takers are subject to special scrutiny.³²

In particular, the Commission staff have indicated that a person who aggregates and nets securities transactions performs an activity that may be subject to broker registration.³³ See also the UPI no-action position discussed above (no-action relief provided to a Plan recordkeeper relied in part on a representation that the recordkeeper would not net and match orders).³⁴

Notwithstanding the foregoing, with respect to the conclusion that UPI would not net or match orders of Plans, the Commission staff's no-action position included a detailed description of the staff's understanding of the process for aggregating and netting orders of Plans for submission to mutual funds. Specifically, UPI would create a data file for the trust company's use that would show orders by Plan (*not by participant*), fund and trade type (buy or sell). On a daily basis, the trust company would review the data file and "independently" calculate the orders and forward the orders to mutual funds with cash to settle the trades. UPI would maintain back-up documentation to support the trust company's calculation of the orders.

CIKR's Unregistered Recordkeeper Members Do Not "Net" Trade Orders as Understood in the Commission Staff's No-Action Positions.

As noted above, we are particularly concerned that the following statement in the Release – "some administrators for employer-sponsored Retirement Plans offset purchase and sale transactions in the same target mutual fund by different participants in the Plan and submit a net order to the transfer agent of the mutual fund" – either implicitly misinterprets the UPI no-action facts or signals a departure from the UPI position. Either case is particularly troubling.

Most importantly, while they may in some cases be entitled to securities law protections *as if* they were individual investors,³⁵ Plan participants are trust beneficiaries and not the owners (actual or beneficial) of a Plan's underlying securities. These protections may be appropriate where the

³¹ See SEC No-Action Letter, *Urrutia, Carlos M.* (pub. avail. June 23, 1980).

³² For example, a Court has held that order-takers would not perform a solely clerical and ministerial activity if they have continuous contact with the public and their duties require familiarity with the securities business, even if they are prohibited from soliciting orders from customers or making securities recommendations. *Exchange Serv., Inc. v. SEC*, 797 F.2d 188 (4th Cir. 1986).

³³ Although it is not entirely clear, it appears that Transcorp did not aggregate or net orders. In this regard, the enforcement order issued to Transcorp notes that Transcorp instructed the issuer or broker-dealer to issue the securities in the name of "Transcorp f/b/o [the customer]." Thus, it appears that Transcorp held separate securities for each customer rather than aggregating or netting the orders.

³⁴ There is some authority suggesting that aggregating orders, without netting purchases and sales, may not trigger the registration requirement. In a no-action letter regarding an odd-lot program similar to that described in Pacific Telesis, the Commission staff concluded that it would not commence an enforcement action for failure to register as a broker-dealer where, under the odd-lot policy, "sell orders may be aggregated with other sell orders under the Selling Program and purchase orders may be aggregated with other purchases under the Purchasing Program, but such sell orders and purchase orders may not be netted." Home Oil Co., Ltd. (pub. avail. Aug. 19, 1993) (indicating that the Commission reached its conclusion in part because "no matching of the purchase and sale orders will take place whatsoever").

³⁵ SEC No-Action Letter, *The PanAgora Group Trust* (pub. avail. Apr. 29, 1994). We also recognize that Commission staff have taken the enforcement position that individual Plan participants may be advisory "clients" under the Advisers Act.

Plan's fiduciaries otherwise disclaim any responsibility over the investment choices of the participant. However, there is no similar need to require broker registration for those *implementing* participant investment choices "inside" a Plan when all securities transactions on behalf of the Plan as record owner are effected through an Intermediary who is itself either a registered broker or a bank exempt from broker registration because it is fully regulated under banking law.

The above statement also ignores an important fact – recordkeepers do not "submit [] net trade order[s] to the transfer agent of the mutual fund." Only an Intermediary or NSCC (acting as an Intermediary) does so. Recordkeepers transmit trade orders to the Intermediary, who is responsible for confirming them. Intermediaries, not recordkeepers, are also responsible for ensuring proper implementation of the Plan's trade orders, *e.g.*, for seeking and obtaining best execution. Recordkeeper order taking at the participant level is a purely ministerial/clerical function.

The ARA and CIKR appreciate the ongoing opportunity to work with the Commission on these issues of great importance to our diverse membership of retirement marketplace participants. We would welcome the opportunity to discuss these comments further with you. Please contact Craig Hoffman, ARA General Counsel, at [REDACTED] with respect to any questions regarding the matters discussed herein. Thank you for your time and consideration.

Sincerely,

/s/

Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/

Judy A. Miller, MSPA
Executive Director, ACOPA

/s/

Craig P. Hoffman, Esq., APM
General Counsel
American Retirement Association