Filed electronically at www.regulations.gov

April 14, 2016

Mr. Brent Fields, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Comments on Securities and Exchange Commission's Concept Release on Transfer Agent Regulations, File Number S7-27-15

Dear Secretary Fields:

The SPARK Institute is pleased to submit these comments to the Securities and Exchange Commission (the "Commission") regarding its Concept Release on transfer agent regulations. Consistent with the Concept Release's discussion of retirement plan recordkeepers, we are writing to express our strong belief that the services provided by retirement plan recordkepeers do not raise regulatory issues that warrant potential regulation as SEC registered transfer agents. Accordingly, we would like to take this opportunity to provide further information to the Commission on the functions that retirement plan recordkeepers provide today, the regulatory regimes already governing retirement plan recordkeepers, and the reasons why retirement plan recordkeepers do not warrant further Commission regulation based on their current activities. In particular, we believe that regulating retirement plan recordkeepers under SEC rules, given the services they typically provide today, would be unnecessary and contrary to the securities laws and Congress's repeatedly expressed intent. For those reasons, we very much appreciate and applaud the Commission for seeking preliminary comments through a Concept Release prior to issuing any regulatory proposal.

The SPARK Institute represents the interests of a broad-based cross section of retirement plan service providers and investment managers, including banks, mutual fund companies, insurance companies, third-party administrators, trade clearing firms, and benefits consultants. Collectively, our members serve approximately 85 million employer sponsored plan participants. As a result, we are uniquely positioned to provide input on what services defined contribution recordkeepers *actually* perform for retirement plans.

I. BACKGROUND

A. "Retirement Plan Recordkeepers" v. "Third-Party Administrators"

In the retirement industry, the term "recordkeeper" or "retirement plan recordkeeper" generally refers to an entity that provides a variety of services to retirement plans, which are very different from the "recordkeeping" services performed by a transfer agent. Whereas a transfer agent may facilitate the clearance and settlement of securities by performing recordkeeping functions related to the issuance, transfer, cancellation, and registration of securities, retirement plan recordkeepers are generally understood to perform functions distinctive of transfer agents, including but not limited to the maintenance of retirement plan records, nondiscrimination testing, tax reporting, and investment management. Moreover, recordkeepers take on a myriad of business models, some of which are affiliated with an investment manager for the plans' underlying investments, while others are not.

More narrowly, the term "third-party administrator" is generally understood to mean entities that are not affiliated with the investment manager for the plans' underlying investments, whose entire business is based on maintaining plan records and providing other services. A number of SPARK members would be considered third-party administrators as that term is commonly understood. Other SPARK members would not be considered third-party administrators as it is understood in the retirement industry because their services go beyond plan services to include offering proprietary mutual funds and other investment management services. Both groups are considered retirement plan recordkeepers as that term is generally understood.

We are careful to draw this distinction in the retirement industry's lexicon because the Commission's Concept Release refers to "Third-Party Administrators", or TPAs, to describe any entity that is selected by the "plan administrator" to provide services to the plan.[1] As we have explained above, this use of the term "Third-Party Administrator" would cover far more service providers than would generally be understood by the entities that the Commission is attempting to describe through its defined term. We believe that this nuanced distinction could have significant implications for the Commission as it evaluates the need to make potentially broad changes to the overall regulatory regime for transfer agents. For instance, it would be very rare for a "third-party administrator" to qualify as a transfer agent. However, we understand that some recordkeepers have previously registered as transfer agents voluntarily, even when it was unclear that they were performing statutory transfer agent functions. When referring to all retirement plan service providers below, including those affiliated with a plan's underlying investments, we will use the term "recordkeeper" or "retirement plan recordkeeper," in a manner consistent with how the term is understood in the retirement industry.

---

[1] *See* Securities and Exchange Commission Concept Release on Transfer Agent Regulations, File No. S7-27-15 (December 22, 2015) ("Concept Release") at 191, n. 542. Each plan has a "plan administrator" that is named in the governing plan documents to administer the plan. ERISA § 3(16)(A). In most cases, the plan administrator is the plan sponsor (i.e. employer) or a committee appointed by the plan sponsor. In an ERISA-governed plan, the plan administrator is a fiduciary. The plan's recordkeeper is typically engaged by the plan administrator to perform certain services, including maintaining plan records, but the plan administrator retains discretionary authority over all plan administration decisions.

B. Retirement Plan Recordkeepers Perform A Broad Range Of Services

Because recordkeepers provide a broad range of services, the term that we painstakingly defined above can be somewhat misleading as it fails to fully characterize the broad range of services actually performed by recordkeepers. As noted in the Concept Release, one responsibility of a recordkeeper is to act as an "intermediary" between participants and the plan. However, recordkeepers do much more than maintain plan records. In fact, many recordkeepers provide services to retirement plans that have nothing to do with maintaining plan "records." These services may include assisting plan fiduciaries with administrative and compliance functions required by the Employee Retirement Income Security Act of 1974 (ERISA) and the qualification rules required under the Internal Revenue Code (the Code). To provide such assistance, recordkeepers perform a wide variety of services, often including, but not limited to:

- Preparing nondiscrimination testing to comply with Code sections 401(a)(4), 401(k), 401(m), and 410.
- Offering pre-approved model plan documents, amending those documents to reflect changes in the law, and maintaining a valid opinion letter from the Internal Revenue Service (IRS).
- Preparing a wide range of participant communications for plan sponsor review, including fee disclosures, qualified default investment alternative notices, automatic enrollment notices, special tax notices, summary annual reports, etc.
- Processing distributions and withdrawals from the plan pursuant to plan and IRS rules and preparing IRS Form 1099-R or other required tax forms for the plan.
- Maintaining a website and call center for participants to exercise their rights under the plan and access a range of services and information about the plan.
- Preparing "signature ready" annual reports (Form 5500) for filing with the Department of Labor (DOL), and filing those reports using DOL's EFAST electronic filing system.

This list only begins to scratch the surface on the range of services recordkeepers provide to retirement plans and their participants. In other words, it is only through a narrow lens that a plan recordkeeper is viewed as primarily involved in maintaining plan records. However, it would also demonstrate a misunderstanding of the services recordkeepers provide by suggesting that the typical recordkeeper performs statutory transfer agent functions requiring registration with the Commission or being otherwise regulated as a transfer agent or broker-dealer.[2]

It is also important to note that there is no legal requirement for a retirement plan to hire a recordkeeper. In fact, a retirement plan (i.e. the plan sponsor) could maintain its own records of participant accounts. We highlight this fact to point out that, if the Commission were to adopt rules treating recordkeepers as transfer agents without regard to whether it performs a statutory

[2] Our letter focuses primarily on transfer agent regulations, but we would also point out that recordkeepers do not perform the functions requiring treatment as a broker-dealer. If a recordkeeper does perform broker-dealer functions, it will have an affiliated broker-dealer, as many SPARK members do. Most of the points we make in this letter regarding the services provided by recordkeepers and associated regulatory oversight are also applicable to the questions the Commission asked about broker-dealer regulation.

transfer agent function, a retirement plan itself could become a transfer agent – a result that clearly was *not* intended by Congress when it defined transfer agents.

C. Retirement Plan Recordkeepers Are Already Subject To Extensive Federal Regulation

Beyond this brief introduction to the wide range of services retirement plan recordkeepers provide, we would also like to provide the Commission with an overview of the extensive federal regulatory environment in which recordkeepers operate today. The Concept Release specifically asks whether commenters have any concerns regarding recordkeepers that are not registered with any federal financial regulator. The premise of this question – that recordkeepers operate in the absence of federal regulation – is wholly unsupported by our membership's experience dealing with extensive federal regulation from multiple agencies. Accordingly, the examples we have provided below are intended to alleviate any possible concerns that recordkeepers operate in an environment free from appropriate federal regulation. Like our discussion of the services provided by retirement plan recordkeepers above, the following list of federal regulations offers just a glimpse into the range of federal regulations impacting the day-to-day operations of recordkeepers.

- ERISA Prohibited Transaction Rules. There are two sets of prohibited transactions in ERISA: (1) the "per se" transactions contained in ERISA section 406(a); and (2) the fiduciary self-dealing/kickback transactions in ERISA section 406(b) (discussed later). There are parallel provisions in the Code which impose significant excise taxes on persons participating in a prohibited transaction. Section 406(a) of ERISA prohibits a fiduciary from causing a plan to engage in almost any transaction with a party-in-interest to the plan, including a recordkeeper. Specifically, this provision prohibits a direct or indirect sale or exchange, or leasing, of any property, the lending of money or other extension of credit or the furnishing of goods, services, or facilities between the plan and a party in interest, and the transfer to, or use by or for the benefit of a party in interest, of any assets of the plan.[3] As a result, nearly every transaction involving a service provider and a plan requires an exemption from the prohibited transaction rules, including the very act of being paid to furnish services.

- Reporting and Disclosure Requirements. Service providers, including recordkeepers, are subject to detailed reporting of their services, fees, and other compensation under Labor Reg. § 2550.408b-2. This detailed regulation prohibits "covered service providers," including recordkeepers, from entering into a contract or arrangement for services with the plan unless a detailed disclosure is provided from the service provider to the plan fiduciary responsible for engaging the provider. Labor regulations mandate that such disclosure is made reasonably in advance of the date the contract or arrangement is entered into, and extended or renewed. This disclosure must be updated as soon as possible if any of the information changes, but no later than 60 days.[4]

[3] ERISA § 406(a)(1)(A-D).

[4] Labor Reg. § 2550.408b-2(c)(1)(v)(B).

- Prohibition on Termination Fees. Service providers to plans, including recordkeepers, are prohibited from including in their contracts any termination fees or similar charges, except a minimal fee to allow recoupment of reasonable start-up costs.[5]

- Bonding. Section 412 of ERISA requires that a fiduciary and any service provider, including a recordkeeper, that "handles" funds or other property of an ERISA plan must be bonded to provide protection to the ERISA plan against loss by reason of acts of fraud or dishonesty on the part of the plan official. The bond must be in the amount of the lesser of (a) 10% of the assets "handled" with respect to the plan, or (b) $500,000.[6]

- Audit and Oversight of Plan Records. When a plan is audited by DOL or IRS, the plan must provide evidence that no violation of the law or prohibited transaction occurred. For example, if a participant took a withdrawal prior to age 59 1/2, the plan must be able to show that the withdrawal was taxed appropriately and the correct penalties were assessed.[7] Part of that analysis would require the plan to show the correct withdrawal amount because the tax and withdrawal penalty are based off that value. Without a system in place to ensure transactions are processed correctly as well as a system in place to maintain accurate books and records for participant transactions, plans would not be able to comply with their current legal obligations.

- Acting as Fiduciary or Providing Advice. When a plan service provider, including some recordkeepers, exercises any discretionary authority or discretionary control respecting management of the assets of the plan, renders investment advice for a fee or other compensation, or has any discretionary authority or discretionary responsibility in the administration of the plan, the service provider is an ERISA fiduciary, subject to many additional layers of regulation under ERISA.[8] In fact, anyone who thinks service providers are not regulated and subject to oversight by DOL need only peruse the *hundreds of thousands* of comments filed with respect to DOL's fiduciary proposal, expanding the activities of service providers that are considered fiduciary investment advice, triggering the highest duty known to law.

  When a service provider acts as a fiduciary, additional requirements apply under ERISA. The responsibilities and liabilities of fiduciaries are too numerous to list here, but at a high level, fiduciaries "have important responsibilities and are subject to standards of conduct because they act on behalf of participants in a retirement plan and their beneficiaries."[9] These responsibilities include: acting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits;

---

[5] Labor Reg. § 2550.408b-2(c)(3).

[6] ERISA § 412(a)(2).

[7] *See* Code § 72(t).

[8] ERISA § 3(21).

[9] Department of Labor, "Meeting Your Fiduciary Responsibilities," available at http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html.

carrying out their duties prudently; and following the plan documents.[10] In addition, section 406(b) of ERISA prohibits certain "self-dealing" transactions by fiduciaries, including the fiduciary prohibition on "deal[ing] with the assets of the plan in his own interest or for his own account" or receiving "any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan."

In fact, it is because ERISA prohibited transaction rules are *stricter* than the rules for fiduciaries under the securities laws that DOL's proposal has caused so much concern among so many financial institutions.

The examples provided above are not an exhaustive description of the federal regulations and oversight impacting retirement plan recordkeepers. They are simply intended to provide the Commission with a general overview of the ways in which recordkeepers are already regulated by federal agencies and to provide context for our discussion below explaining why the activities of recordkeepers do not warrant potential broad changes to the overall regulatory regime for transfer agents.

II. RETIREMENT PLAN RECORDKEEPERS SHOULD NOT BE REGULATED AS TRANSFER AGENTS

Based on the discussion above, it should be clear that retirement plan recordkeepers should not be required to register or otherwise be regulated by the Commission as transfer agents, except in cases when recordkeepers actually perform statutory transfer agent functions. In more detail below, we will specifically discuss why we believe that any broad sweeping regulation of retirement plan recordkeepers as transfer agents would be contrary to the securities law, contrary to Congress's repeatedly expressed intent, and unnecessary.

A. Recordkeepers Do Not Perform Statutory Transfer Agent Functions

Section 3(a)(25) of the Exchange Act defines a transfer agent as a person who performs certain transfer agent functions "*on behalf of an issuer of securities or on behalf of itself as an issuer of securities.*" As noted in the Concept Release, the majority of recordkeepers do not perform statutory transfer agent functions because recordkeepers do not perform functions on behalf of the security's issuer.[11] Rather, they perform functions on behalf of plan sponsors and employers. The mere fact that recordkeepers may interrelate with mutual fund companies or their transfer agents is not dispositive that recordkeepers perform transfer agent functions. Accordingly, we would strongly discourage the Commission from further extending the transfer agent rules to entities that provide services and functions that are not enumerated within the statutory definition of transfer agent functions.[12] The pursuit of such a result would also be contrary to Congress's repeated intent and would be unnecessary.

---

[10] ERISA § 404(a).

[11] Concept Release at 191.

[12] Concept Release at 198, Q-125.

In crafting future guidance, the Commission must follow the statute and focus on the activities actually being performed. As the Commission works on this effort, we find it important to emphasize the fact that a plan participant's security interest is in the plan itself, not in the investment the plan purchases as a way to fund its obligations. This type of security is not contemplated by the transfer agent rules. Changing the regulation to encompass interests in a plan would not only be a departure from the statute, it would create overlap with DOL as the current regulator.

B. Regulation Of Recordkeepers As Transfer Agents Is Contrary To Congressional Intent

As we detailed above in section I.C., retirement plan recordkeepers operate in an environment that is extensively regulated by federal entities, most notably DOL. If Congress wanted to extend SEC oversight to recordkeepers as transfer agents, it could amend the current definition of transfer agents under the Exchange Act. Congress has not chosen to do so.

Congress has recently demonstrated its intent with respect to the regulation of recordkeepers by not imposing further regulations or constraints when enacting the Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Through Dodd-Frank, Congress created a new entity – the Consumer Financial Protection Bureau (CFPB) – to act as a regulator over financial products and services that Congress viewed as not fully regulated. Congress chose not to include recordkeepers among that group. Rather, section 1027(g) of Dodd-Frank currently exempts from the CFPB's control recordkeepers "who are engaged in the activity of establishing or maintaining any . . . specified arrangements," including qualified retirement plans. Under this exemption, CFPB cannot regulate plan recordkeepers unless DOL and Treasury agree that a regulatory gap exists. There has been no such grant – and for good reason, because the primary regulators have no lack of methods to regulate plans and the service providers to them.[13]

C. Regulating Recordkeepers As Transfer Agents Is Unnecessary Because Existing Rules Already Achieve The Commission's Goals

We appreciate that, with the growth of "omnibus" accounts, discussed in detail in the Concept Release, from time to time omnibus account holders might perform services one would typically associate with an issuer – particularly a mutual fund. Thus, the question of whether or not a retirement plan recordkeeper or any other "omnibus" account holder is a transfer agent tends to be raised whenever the omnibus account holders are being called upon to provide transparency or enforce rules that must be imposed by the issuer. For example, the Commission promulgated Rule 22c-2, which requires mutual funds to enter into legal agreements with intermediaries (including plan recordkeepers) to provide funds access to information about underlying shareholder transaction activity in these accounts. This rule allows mutual funds to enforce excessive trading policies and ensure redemption fees are being properly assessed. We

[13] Note that Dodd-Frank mentions transfer agents many times, including clarification that transfer agents are regulated by the Commission and thus not subject to CFPB oversight. Had Congress wanted to expand transfer agent regulation to include plan service providers, an entity *mentioned in the same law*, it could have easily done so.

assume similar solutions will be in place for money market funds that adopt "fees and gates" policies.

This solution – the fund company entering into contracts with intermediaries – has worked well. A recent Governmental Accountability Office report found no issue with this structure, and said the system to prevent frequent trading "provides the means for . . . mutual funds to fulfill their obligations to investors, and curbs frequent and collective trading."[14] In other words, the current regulatory solution is working.

Regulating recordkeepers as transfer agent when they do not perform statutory transfer agent functions is, therefore, a solution in search of a problem.

III. CONCLUSION

As the Commission discusses in the Concept Release, additional regulatory, policy, and other issues associated with transfer agents may require possible regulatory actions to address those issues. We do not believe that there are any issues associated with recordkeepers that require Commission oversight, outside of what is in place today. However, we note that some SPARK member recordkeepers have already registered as transfer agents (typically because the firm has an affiliate that is performing statutory transfer agent functions), some SPARK members have registered as transfer agents and then deregistered, and some have consistently taken the position that transfer agent registration is not required. This diversity among similarly situated entities suggests there may be value in clarifying the Commission's position regarding the activities of recordkeepers versus those of registered transfer agents and registered broker-dealers. SPARK would welcome such clarification. However, any effort must fully understand the entities it is addressing, including their regulatory environment, avoid departure from the statute, maintain consistency with congressional intent, and not create a solution in search of a problem through unnecessary regulation.

One consistent criticism of DOL's fiduciary project has been that it fails to recognize the regulatory structure already in place for brokers and advisers under the securities laws. We urge the Commission not to make the same mistake in looking at service providers regulated under ERISA.

* * * *

[14] Government Accountability Office, 401(K) PLANS: Frequent and Collective Trading Are Uncommon and Not a Significant Concern for Plan Participants, Sponsors, or Mutual Funds (May 14, 2015), http://www.gao.gov/products/GAO-15-427R.

We appreciate the opportunity to comment on this important topic. If the Commission has any questions or would like more information regarding this letter, please contact me or the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP [redacted] or [redacted]).

Sincerely,

Tim Rouse
Executive Director