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Invested in America

April 24, 2012

The Honorable Jack Markell
Governor of Delaware
Carvel State Office Building
820 North French Street, 12th Floor
Wilmington, DE 19801

RE: State of Delaware ruling on unclaimed property and reporting of assets based on inactivity.

Dear Governor Markell:

On behalf of the Securities Industry and Financial Markets Association ("SIFMA")[1], I respectfully request your assistance in accommodating our members' concerns with the Unclaimed Property Rule concerning account inactivity. We seek to work with you and the State to modify this rule so that our members can continue to appropriately administer to individual investors. SIFMA's members serve clients that are located across the country by providing them with financial services and safeguarding their investments. In our view, the potential negative consequences, some of which are detailed in this letter, for our customers of the State Escheator's interpretation of the law warrant your consideration in amending the law, or at a minimum, the State's application of the law to the financial services industry.

In 2008, the State of Delaware amended Title 12 of the Delaware Code by enacting SB 334, which reduced the dormancy period for unclaimed property from five years to three years. Subsequently, on February 3, 2012, the Delaware State Escheator announced via e-mail that the changes made by SB 334 also require the escheatment of securities-related property if a client has not exercised dominion or control over his or her account, or asserted a right of ownership or possession, or made a presentment or demand for payment and satisfaction, or performed any other act in relation to or concerning the shareholder's account that would demonstrate the shareholder's awareness and ownership of the account.

This represents a significant and troubling deviation from the prevailing standard by categorizing a securities account as "unclaimed property." Under the prevailing standard, mail

[1] The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

returned by the post office ("RPO") from the customer's mailing address on record was the necessary triggering event for unclaimed property. We are deeply concerned that substituting an "inactivity" standard for the prevailing "RPO" standard will negatively impact the financial services industry and, more importantly, their customers. The following list details a few major ways in which customers will be negatively impacted by the new inactivity rule:

1. **Creates a significant and disproportional risk to investors seeking long term investment strategies.** The prudence of setting a sound investment strategy and staying with it through favorable and unfavorable markets has long been espoused by the financial experts for suitable investors. Customers following this advice are likely to be monitoring their investments via their statements and less likely to have regular transactions in their accounts or proactive contact with their broker. Delaware does not accept direct dividend / interest reinvestment as client activity even though it has been instructed by the client, and is considered a preferred means of investing (i.e. normal course of business).

2. **Discourages investment in tax deferred accounts (e.g. 529s, IRAs) that are formulated around the concept of planning for long term investment and by definition often remain inactive for years.** Under federal law, starting at age 70 ½, persons must annually withdraw from their retirement accounts a Required Minimum Distribution (RMD). A person with multiple retirement accounts need not take a RMD from each account; rather s/he can choose to take the RMD from a single account, leaving the others untouched. Under Delaware law, however, a client's decision not to withdrawal money from one or more accounts would unfairly trigger the escheatment process. A retiree who has changed addresses, is in declining health or can't otherwise be easily found would then have his or her entire retirement account improperly turned over to the state at age 73 ½. Even if the retiree is later identified, s/he may have been substantially harmed by the selling of the shares and the loss of tax deferred status for the account.

3. **Creates a potential conflict between the state's unclaimed property law and SEC procedures governing notices to be sent to customers.** SEC Rule 17Ad-17 is cited by the state in explaining the decision to move from a five year to a three year dormancy period, and clearly states that a shareholder is to be considered "lost" when an RPO event occurs. However, the escheatment of securities when the owner is not "lost" is diametrically opposed to the spirit of the SEC rule to keep account records active even after they are deemed "lost."

4. **Creates a significant and disproportional risk to senior citizens who are less likely to respond to the statutory due diligence letter.** At perhaps one of the most critical times in their financial lives, the mere non-response to a due diligence letter would result in the liquidation of a lifetime of securities holdings even if seniors were actively monitoring their statements. Moreover, as described in more detail in number 8, below, the immediate liquidation of income-generating securities will deprive these customers of the future income they would depend on in their retirement years. Other types of customers that are less likely to respond to a due diligence letter include any frail, sick, or mentally disabled, but not incapacitated, individuals that are not under guardian supervision.

5. **Creates a significant and disproportional risk to accounts owned by active U.S. servicemen and servicewomen whose mail is sent care of military foreign posting abroad.** This population would likely not be maintaining proactive communication with their service providers; however, in accordance with Delaware escheat laws, as a foreign address their accounts would escheat and liquidate shortly thereafter.

6. **Creates a significant and disproportional risk to all accounts with foreign owners.** Inherent with being a foreign account owner, proactive communication with the holder may be less frequent. Also, the additional time required to deliver and receive mail from foreign locations increases the likelihood that all foreign investors would have limited or insufficient notice to take action to avoid escheatment of their assets. This risk is especially acute for non-English speaking foreign investors who may require extra time to translate the due diligence letter and consequently, through no fault of their own, may have their assets escheated and liquidated as a direct result of a language barrier. With the requirement to escheat all of these inactive, but not "lost," foreign owned assets to Delaware, this would seemingly validate foreign investor concerns over asset protection of financial institutions in the U.S., as was evidenced in the recent media coverage of this issue in Sweden. [2]

7. **Creates a significant, and disproportional, risk to those customers with a relatively lower net worth that tend to trade less frequently in their accounts**. They may also be more skeptical to sign a due diligence letter for an account about which they know they are actively receiving statements.

8. **As a direct result of Delaware's policy of expeditiously liquidating securities shortly after escheatment, the rightful owners that are not "lost" would immediately be deprived of their intended investment objective, dividends and interest, subsequent interest in mergers and acquisitions, and even tax deferred benefits.**

9. **The rule does not recognize the realities of the relationship between broker-dealers that have the direct relationship with their customers, and the clearing firms that clear transactions and custody the customer assets.** Pursuant to rules and regulations that apply to the securities industry (including but not limited to SEC Rule 15c3-3 and FINRA Rule 4330), broker-dealers must qualify to custody customer assets, and other broker-dealers (known as introducing brokers) that do not qualify (or that have chosen not to undertake the requirements of the rules governing the custody of assets) may make contractual arrangements with qualifying firms (known as clearing or carrying firms) to custody their customer assets. The clearing and introducing brokers may, by rule, allocate certain responsibilities for the customer accounts to each other. For example, and directly relevant to the issue of customer activity, the introducing broker is generally responsible for all "know your customer" requirements, such as knowing the address of the customer. Generally, a clearing firm is responsible for the delivery of account statements to the introduced customers. While a clearing firm "clears" trades that are booked to a customer account, it does not execute the trades or

[2] Nordens Strsta Affarstidning – NU 401 000 LASARE, 3 April 2012.

directly take the customer's trading instructions. A clearing firm also does not make recommendations to the customer or undertake to have any direct communications with the customer about the account other than to deliver to the customer such documents that it has agreed with the introducing broker it will deliver. Thus, the firm that is in possession of the assets that would be escheated is not in the position to determine whether or not the customer has demonstrated "awareness and ownership of the account". For this reason, a standard based on the return of documents delivered by the custodian of the assets is more sensible than one based on activity (or the lack of activity) that would not be obvious to the custodian.

In addition to the many ways our members communicate with their clients regarding their investments, there are also federal consumer protection laws with which our members must comply. SEC Rule 17Ad-17 requires due diligence to be performed, including searching an external database for a more current address and mailing a notice to the client, when there is a reasonable indication that a client may be "lost". Under Federal securities laws a reasonable indication that a client is "lost" is defined by returned mail from the address of record on an account. The Dodd-Frank Act requires changes to SEC Rule 17Ad-17 that will soon take effect, extending the existing requirements to broker dealers and adding a requirement to mail notices to "missing" security holders, defined as those shareholders with an aged outstanding check. Additionally, SEC rule 17a-3 requires each firm to perform due diligence by periodically furnishing existing account information on the account record for the customer to substantiate.

The Delaware escheatment rule; however, seems to fundamentally conflict with the premise of these federal securities laws and makes the overreaching presumption that a client's assets are unclaimed even when they are receiving mail, and there is no reason for them to be considered "lost" or "missing." An investor that intentionally chooses not to trade in their securities account, or proactively contact the account holder, but who is in receipt of all correspondence related to their account, will now be deemed by Delaware rule to have abandoned their assets.

SIFMA has always worked with our members to support education and compliance with state abandoned property rules. However, it appears that the new Delaware requirement which states that shareholders which otherwise have no indication of being "lost" be escheated does not operate in the best interests of financial services customers. SIFMA members intend to comply with the law; however, there still appears to be ambiguity between the position that the State Escheator is taking and the information that is actually being published by his office with regard to "lost" accounts.

Although our industry may be among the first to recognize the potential negative implications of the new standard, we foresee this becoming a much larger issue with the general population as public awareness increases. If the process does not seem intuitive to industry professionals, it will be even more difficult to explain the intentions of the State to those that "lost" their securities accounts simply because they did not engage in a trade or contact the transfer agent or their broker. Further, by eliminating the rights of an investor in the future value of their investment (by immediately liquidating the security upon escheatment), the State has, in effect, exercised eminent domain over such property without appropriate compensation to the property owner. This does not seem to align with an escheatment process that is supposed to protect assets, and designed to return such assets upon the submission of a proper claim by the original owner. The citizens of the State of Delaware, and those who reside outside the State but whose assets will be

subject to escheatment to the State, should not be caused to pay a "tax" to the State through the confiscation of their property simply because they have chosen to be passive, rather than active, investors.

We respectfully request that your office review its position as soon as possible to ensure that owners' rights are not being neglected by State statute. We earnestly seek your assistance in working with the state administrators and the Legislature, if necessary, to restore the RPO standard for identifying unclaimed securities related property. This approach is in the best interest of the State, the industry, and most importantly our Delaware and Foreign customers.

Thank you for your consideration of our views. We look forward to working with you on this important and timely matter. In the meantime, if you have any questions, or if would like to discuss this matter further, please contact me at 212-313-1233 or via email at nlancia@sifma.org.

Sincerely,

Nancy Donohoe Lancia
SIFMA Managing Director