

(1)(i) The failure to surrender was due to exceptional circumstances as defined in section 240(e)(1) of the Act; and

(ii) The alien surrenders for removal as soon as possible thereafter, and at that time presents documentary evidence that demonstrates, by clear and convincing evidence, the existence of exceptional circumstances.

12. In part 241, subpart A, a new § 241.16 is added to read as follows:

**§ 241.16 Construction.**

(a) *Order of removal.* For purposes of § 241.13, § 241.14, and § 241.15, the term *order of removal* shall apply to orders issued pursuant to the Act as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law 104-208.

(b) *Detainers.* Nothing in this part may be construed to relieve local, State, or Federal authorities from complying with the terms of a lawfully issued Service detainer.

(c) *Service.* For purposes of § 241.13, § 241.14, and § 241.15, in the case of an alien who is not personally served with an order of removal, service is sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with section 239(a)(1)(F) of the Act.

(d) *Effect on bonds.* Failure to surrender as required by this part shall not constitute breach of any outstanding immigration bond. Such bond shall remain in full force and effect, however, and the Service may issue a demand on the obligor to produce the alien for removal.

Dated: August 27, 1998.

**Janet Reno,**

*Attorney General.*

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## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Part 240

[Release No. 34-40386; File No. S7-25-98]

RIN 3235-AH53

### Processing of Reorganization Events, Tender Offers, and Exchange Offers

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission is proposing for comment amendments to Rule 17Ad-14 under the Securities Exchange Act of 1934. Under the proposed amendments, registered transfer agents acting on behalf of issuers in connection

with reorganization events would be required to set up accounts at securities depositories to receive securities by book-entry movements from depository participants. Also under the proposal, registered transfer agents acting as depositories, exchange agents, or reorganization agents would not be permitted to require a securities depository to deliver securities certificates prior to the third business day following the expiration date of the tender offer, exchange offer, or reorganization event. The proposed amendments are designed to increase efficiency and certainty in the processing of reorganization events, tender offers, and exchange offers.

**DATES:** Comments should be received on or before November 3, 1998.

**ADDRESSES:** Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Mail Stop 6-9, Washington, DC 20549. Comments also may be submitted electronically at the following E-mail address: rule-comments@sec.gov. All comment letters should refer to File No. S7-25-98; this file number should be used on the subject line if E-mail is used. Comment letters will be available for public inspection and copying at the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Electronically submitted comment letters will be posted on the Commission's Internet site (<http://www.sec.gov>).

**FOR FURTHER INFORMATION CONTACT:** Jerry W. Carpenter, Assistant Director, or Theodore R. Lazo, Attorney, at 202/942-4187, Office of Risk Management and Control, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, N.W., Mail Stop 10-1, Washington, DC 20549.

#### SUPPLEMENTARY INFORMATION:

#### I. Current Rules Governing the Processing of Securities Certificates in Tender Offers, Exchange Offers, and Reorganization Events

##### A. Tender Offers and Exchange Offers

In 1984, the Commission adopted Rule 17Ad-14 under the Securities Exchange Act of 1934 ("Exchange Act")<sup>1</sup> to address inefficiencies in the processing of securities certificates in tender offers and exchange offers.<sup>2</sup> Rule 17Ad-14 requires any registered transfer agent acting as a depository<sup>3</sup> in the case

of a tender offer or as an exchange agent<sup>4</sup> in the case of an exchange offer to establish and maintain specially designated accounts at all qualified registered securities depositories<sup>5</sup> holding the subject company's<sup>6</sup> securities for purposes of (1) receiving tendered securities by book-entry movement and (2) returning securities that have been withdrawn from the offer by book-entry movement.

Before the adoption of Rule 17Ad-14, bidders could require the tender of securities certificates outside the depository system even though in many cases the delivering entities were depository participants and the securities themselves were eligible for processing by the depository.<sup>7</sup> This was an inefficient and time-consuming process, especially in large tender offers when severe time constraints existed.<sup>8</sup>

all securities tendered by security holders and to pay the security holders for the tendered shares. 17 CFR 240.17Ad-14(c)(5). A bidder is a person who makes a tender or exchange offer or on whose behalf a tender or exchange offer is made. 17 CFR 17Ad-14(c)(3).

<sup>4</sup> An "exchange agent" is an agent of a bidder that performs functions in a exchange offer similar to those performed by a depository. 17 CFR 240.17Ad-14(c)(5).

<sup>5</sup> A "qualified registered securities depository" is a clearing agency registered under the Exchange Act that has rules and procedures approved by the Commission to enable book-entry movement of the securities of subject company to, and return of those securities from, the transfer agent through the facilities of that depository. 17 CFR 240.17Ad-14(c)(4). Currently, The Depository Trust Company ("DTC") is the only qualified registered securities depository for corporate debt and equity securities.

Securities depositories carry out several specific functions in the clearance and settlement of securities transactions, e.g.: Accepting deposits of securities from their participants (which currently include broker-dealers, banks, and other financial institutions); crediting those securities to the participants' accounts; and carrying out book-entry deliveries of securities among participants pursuant to the participants' instructions. Securities depositories greatly aid in the Exchange Act's mandate that the Commission use its authority to end the physical movement of securities certificates in connection with the settlement of securities transactions. See Section 17A(e) of the Exchange Act, 15 U.S.C. 78q-1(e).

<sup>6</sup> The term "subject company" is defined in Rule 14d-1(e)(2) under the Exchange Act, 17 CFR 240.14d-1(e)(2), as the issuer of securities sought by a bidder pursuant to a tender offer.

<sup>7</sup> Securities eligible for deposit at a depository are securities that are eligible for deposit at any securities depository that is registered as a clearing agency under the Exchange Act. See 17 CFR 240.17Ad-1(j).

<sup>8</sup> In many cases, depository participants were required to withdraw securities certificates from the depository in order to participate in a tender or exchange offer. Because these certificates typically were held at the depository in nominee name rather than in the name of the beneficial owner, the nominee name certificates had to be sent to the transfer agent to have the record ownership of the securities changed to that of the beneficial owner and to have a new certificate issued before the beneficial owner could deliver the securities to the

Continued

<sup>1</sup> 17 CFR 240.17Ad-14.

<sup>2</sup> Securities Exchange Act Release No. 20581 (January 19, 1984), 49 FR 3064.

<sup>3</sup> A "depository" is an agent of a bidder that is appointed during a tender offer to receive and hold

At that time, securities depositories customarily suspended depository eligibility for securities that were subject to a large tender or exchange offer if the depository or exchange agent did not establish a depository account. This was particularly true if an offer was for a significant percentage of the subject company's stock that was on deposit at the depository and when the subject company's transfer agent and the depository were located in different cities.<sup>9</sup>

The Commission acted to improve the process by requiring agents in tender or exchange offers to establish accounts at securities depositories to permit book-entry movement of securities in connection with the offer. Under Rule 17Ad-14, depository participants can tender their shares pursuant to such offers by forwarding transmittal instructions to securities depositories.<sup>10</sup> Securities depositories then debit tendering participants' accounts and simultaneously credit the accounts of the agent for the offer for the securities tendered. The agents accept book-entry delivery as a completed tender of shares. After a tender or exchange offer expires, the securities depositories make bulk deliveries of the securities certificates to the agent.

The adoption of Rule 17Ad-14 has resulted in a reduction in the amount of securities certificates that must be exchanged among securities depositories, their participants, transfer agents, and depositories and exchange agents during tender or exchange offers. This reduction has led to an increase in the efficient and reliable processing of securities and a decrease in the risk of loss resulting from loss or theft of securities certificates or from manual processing errors. In addition, depositories no longer have to suspend eligibility for the services for issues subject to a tender or exchange offer.

### B. Reorganization Events

Reorganization events typically include conversions, maturities, full or partial redemptions, calls, put option exercises, and warrants and rights

bidder. As a result, it was very difficult for securities depositories to manage their certificate inventory for issues that were subject to tender or exchange offers.

<sup>9</sup> For example, during the summer of 1981 DTC declared the securities of Conoco, Inc. ("Conoco") ineligible for its services because of competing tender offers for control of Conoco by E.I. DuPont de Nemours, Joseph E. Seagram & Sons, Inc., and Mobil Corporation. DTC took this action because it could not process all of the requests that it was receiving for Conoco stock certificates.

<sup>10</sup> Transmittal letters and other delivery instructions are now commonly transmitted electronically instead of by paper to securities depositories.

exercises involving corporate and municipal securities. In recent years, there has been an increase in the volume and complexity of these reorganization events.<sup>11</sup>

The mechanical aspects of reorganization events closely resemble those of tender offers and exchange offers.<sup>12</sup> Under the current method of processing reorganization events, depository participants with positions in the subject securities that are on deposit at securities depositories submit instructions to the depositories to send the subject securities to the reorganization agent.<sup>13</sup> However, the legal documents containing the terms of reorganization events (e.g., bond indentures) often are interpreted to require security holders to submit securities certificates in order to exercise their rights under the event. Similar conditions existed with respect to tender offers and exchange offers before the adoption of Rule 17Ad-14 in 1984. Changes in the law since 1984 have clarified even further that book-entry delivery satisfies legal requirements.<sup>14</sup>

Book-entry delivery is important for efficient securities processing during reorganization events. Depending upon the size and timing of the reorganization event, the securities depositories may have to make multiple deliveries of securities certificates before the expiration date of the reorganization event.<sup>15</sup> In order to control their certificate inventory during

<sup>11</sup> In 1997, DTC processed approximately 76,000 instructions submitted by its participants in connection with conversions and warrants, rights, and puts exercises. Conversions and warrants exercises accounted for the issuance of approximately 685 million shares of stock. The total value of all such conversions and exercises exceeded \$46.7 billion. Letter from Carl H. Urist, Deputy General Counsel and Vice President, DTC (February 5, 1998).

<sup>12</sup> For example, in a bond conversion security holders submit their bonds to a reorganization agent in exchange for another security of the issuer.

<sup>13</sup> Reorganization agents are usually issuers or their transfer agents.

<sup>14</sup> See Revised Article 8 of the Uniform Commercial Code.

<sup>15</sup> Securities depositories usually maintain in their vaults large denomination securities certificates representing aggregated participant positions in that issue of securities ("jumbo certificates"). The number of certificates in smaller denominations is often sufficient only to meet participants' routine withdrawal needs. As a result, each time a securities depository receives a request for certificates it must present jumbo certificates to the transfer agent to be broken down into certificates of smaller denominations. During a reorganization event in which depository facilities are not utilized, the timing and extent of demand for securities certificates can be unpredictable. Therefore, it can be difficult for securities depositories to make requested physical deliveries in the precise denominations required on an expedited basis.

reorganization events, some securities depositories stop accepting deposits of and book-entry delivery instructions for the subject securities prior to the expiration date of the reorganization event.<sup>16</sup> If a depository participant wants to participate in a reorganization event after the depository's cutoff it must submit securities certificates to the reorganization agent on its own.<sup>17</sup>

## II. Proposed Amendments to Rule 17Ad-14

DTC has requested that the Commission amend Rule 17Ad-14 to expand the scope of the rule to include reorganization events in addition to tender offers and exchange offers. DTC also has requested that Rule 17Ad-14 be amended so that qualified registered securities depositories would have three business days following the expiration of a tender offer, exchange offer, or reorganization event to deliver securities certificates that are due to depositories, exchange agents, and reorganization agents.<sup>18</sup>

### A. Establishment of Book-Entry Depository Accounts by Reorganization Agents in Connection With Reorganization Events

Under the proposed amendments to Rule 17Ad-14, reorganization events<sup>19</sup> would become subject to procedures similar to those currently governing tender offers and exchange offers. Specifically, Rule 17Ad-14 would be amended to state that no registered transfer agent may act as a reorganization agent<sup>20</sup> unless within

<sup>16</sup> For example, DTC stops accepting deposits and book-entry delivery instructions in some securities up to five business days prior to the expiration date or payment date for the reorganization event. In the case of maturities or calls, DTC stops accepting deposits thirty days prior to the payment date. DTC stops accepting instructions from its participants regarding voluntary reorganizations activities (e.g., conversions) early on the expiration date or one or two business days prior to the expiration date.

<sup>17</sup> Alternatively, a securities depository could wait to deliver cash or securities to its participants following a tender of securities in a reorganization event until the depository receives full credit for the securities or payment from the reorganization agent. However, the securities depository could then be subject to interest claims or contractual liability from its participants for failure to make deliveries according to the particular terms of the reorganization event.

<sup>18</sup> Letter from Carl H. Urist, Deputy General Counsel and Vice President, DTC (September 14, 1994).

<sup>19</sup> Under the proposed amendments, the term "reorganization event" would be defined to include conversions, maturities, full and partial redemptions, calls, put option exercises, and warrant and rights exercises involving corporate and municipal securities of an issuer.

<sup>20</sup> Under the proposed amendments, the term "reorganization agent" would be defined as an agent of an issuer receiving securities from tendering depository participants and performing

two business days after commencement of the reorganization event it establishes at all qualified registered securities depositories<sup>21</sup> specially designated accounts for purposes of receiving securities tendered to the reorganization agent in connection with the reorganization event.

Under the terms of the proposed amendments, after a reorganization agent establishes the required accounts with each qualified registered securities depository, participants electing to participate in or affected by the reorganization event would be able to deliver the subject securities to the reorganization agent by book-entry movement. After a securities depository received and verified a participant's reorganization instructions, it would debit the subject securities from the participant's securities account and would credit them to the reorganization agent's securities account. Upon receipt of the subject securities into its book-entry account, the reorganization agent would act upon the participants' reorganization instructions (*i.e.*, carry out the conversion, redemption, or other activity). The Commission believes that under the proposed amendments to Rule 17Ad-14, book-entry delivery of securities subject to a reorganization event would satisfy the delivery requirements under the terms of the event.

Requiring reorganization agents to maintain an account with each qualified registered securities depository during the course of a reorganization event would allow the delivery of securities by book-entry movement rather than by physical transfer. As a result, the need for delivery of securities certificates from multiple holders to reorganization agents outside the depository system should be greatly reduced and securities depositories should be able to accept book-entry delivery instructions closer to the expiration date of a reorganization event. Securities depositories also would be able to make bulk deliveries of securities certificates to reorganization agents which should reduce the likelihood of securities

certificates being lost, stolen, or destroyed. In addition, the proposed amendments would further the Exchange Act's mandate that the Commission use its authority to end the physical movement of securities certificates in connection with the settlement of securities transactions.<sup>22</sup>

As noted above, in the context of tender and exchange offers Rule 17Ad-14 has reduced the amount of movements of securities certificates among depositories and exchange agents, participants, and depositories and thereby has reduced the costs and risks associated with such physical transfers. Under the proposed amendments to Rule 17Ad-14, these benefits should also be realized for reorganization events.

### *B. Timing for Deliveries of Securities Certificates in Connection With Tender Offers, Exchange Offers, and Reorganization Events*

The Commission is proposing to amend Rule 17Ad-14 to state that a registered transfer agent acting as a depository, exchange agent, or reorganization agent may not require a qualified registered securities depository to deliver securities certificates prior to the third business day following the expiration date of a tender offer, exchange offer, or reorganization event, as the case may be.

The Commission understands that securities certificates generally are delivered to depositories and exchange agents only as an administrative matter<sup>23</sup> because depositories and exchange agents accept book-entry delivery of shares as a completed tender.<sup>24</sup> Under the proposed amendments, delivery of securities certificates to the reorganization agent after a reorganization event has expired also should become purely an administrative matter.

Rule 17Ad-14 currently does not specify when securities certificates must be delivered. Establishing a three-day period for delivery of securities certificates should ensure that securities depositories have the time necessary to properly account for the inventory of securities certificates to be delivered. In addition, the proposed amendments should establish a clear and uniform date by which securities depositories will deliver securities certificates in

tender offers, exchange offers, and reorganization events.

The proposed amendments to Rule 17Ad-14 regarding delivery of securities certificates are not intended to affect or to alter current practice regarding tender and exchange offers or the obligations of depositories and exchange agents. Portions of the rule have been reorganized in order to maintain certain distinctions between tender or exchange offers and reorganization events as well as to provide clarity. Other technical changes include the addition of the definition of "reorganization agent" and "reorganization event" to the rule and the amendment of the definition of "qualified registered securities depository."

### **III. Request for Comments**

Any interested person wishing to submit comments on the proposed amendments to Rule 17Ad-14, as well as on other matters that might have an impact on the proposal, is requested to do so. The Commission specifically solicits comments as to whether requiring reorganization agents to establish accounts with registered securities depositories in connection with reorganization events presents any issues that are unique to reorganization events (*i.e.*, issues that are not present in the context of tender or exchange offers) or that will create an undue burden upon reorganization agents or others. The Commission seeks comment on whether any additional regulatory safeguards may be required in the context of reorganization events (*e.g.*, restrictions on depository policies that allow securities to be withdrawn from a securities depository in connection with reorganization events). The Commission also seeks comment on whether the term "reorganization events" should be defined to include either fewer or additional events or whether it should be defined more broadly to anticipate new types of reorganization events that may develop in the future.

While the Commission believes that permitting book-entry delivery of securities to reorganization agents is consistent with the delivery requirements under most states' laws, the Commission requests comment on whether any operative agreements governing reorganization events (*e.g.*, bond indentures) specifically require delivery of physical securities certificates.

The Commission also seeks comment on the effect of providing qualified registered securities depositories with three business days following the expiration of a tender offer, exchange offer, or reorganization event to deliver

payment or exchange functions with respect to those tendering participants as required by the particular reorganization event. The term "issuer" is defined in section 3(a)(8) of the Exchange Act, 15 U.S.C. 78c(a)(8).

<sup>21</sup> As noted above, the term "qualified registered securities depository" is defined in Rule 17Ad-14(c), 17 CFR 240.17Ad-14(c). Currently, Rule 17Ad-14(c) only requires a depository to provide book-entry services for a "subject company" in connection with a tender or exchange offer. Under the proposed amendments, the definition of "qualified registered securities depository" would be amended to reflect that each such depository also must be able to provide book-entry services for securities that are subject to a reorganization event.

<sup>22</sup> See Section 17A(e) of the Exchange Act, 15 U.S.C. 78q-1(e).

<sup>23</sup> For example, if a company carries out a tender offer for its own securities, it might want to receive securities certificates in order to cancel them.

<sup>24</sup> These understandings are based on conversations between Commission staff and DTC.

securities certificates. Would delivery of securities certificates three days after the expiration of a tender offer, exchange offer, or reorganization event have any negative effect on their operation? In addressing these issues, the Commission invites commenters to discuss the relevance of the book-entry transfer issues presented in *Pryor v. USX Corp.*<sup>25</sup> to the proposed rulemaking and whether it would be appropriate to impose a time limit within which securities certificates must ultimately be delivered.

#### IV. Costs and Benefits of the Rules and Their Effect on Competition, Efficiency, and Capital Formation

Section 23(a)(2) of the Exchange Act<sup>26</sup> requires the Commission, in adopting rules under the Exchange Act, to consider the impact any such rule would have on competition, and to not adopt any rule which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, section 3 of the Exchange Act<sup>27</sup> as amended by the National Securities Markets Improvement Act of 1996<sup>28</sup> provides that whenever the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

The Commission is considering the proposed amendments to Rule 17Ad-14 in light of the standards cited in sections 3 and 23(a)(2) of the Exchange Act. For the reasons stated herein, the proposed amendments (i) should promote efficiency by ensuring that all

securities transfers associated with reorganization events may be carried out by book-entry movement and by providing a reasonable and uniform amount of time for the delivery of securities certificates that are the subject of tender offers, exchange offers, and reorganization events, (ii) should not adversely affect capital formation because they should not increase issuer transaction costs, and (iii) should not impose any burden on competition because they will apply equally to all registered transfer agents that act as depositories or reorganization agents.

The Commission does not anticipate that the proposed amendments would have a significant effect on competition or impose any burden on competition that is not necessary or appropriate in furtherance of the Exchange Act. Under the proposed amendments, all reorganization agents will be required to establish and maintain separate accounts for book-entry delivery of securities during reorganization events. In addition, the standards with respect to the time in which delivery of securities certificates must be made to depositories, exchange agents, or reorganization agents will apply equally to all qualified registered securities depositories. However, in order to evaluate fully the effects on competition of the proposed amendments, the Commission requests commenters to provide their views and specific empirical data as to any effects on competition that might result from the Commission's proposed amendments to Rule 17Ad-14.

The Commission is considering the costs and the benefits of the proposed amendments to Rule 17Ad-14. The proposed amendments to Rule 17Ad-14 should provide specific benefits to U.S. investors, issuers, and other financial intermediaries. These benefits are not readily quantifiable in terms of dollar value. Providing for book-entry movements of securities that are subject to reorganization events should increase the efficiency of the processing of such events by reducing the need for delivery of securities certificates from multiple holders to reorganization agents. In addition, the proposed amendments to Rule 17Ad-14 should reduce the risk of loss of securities certificates because movements of securities in reorganization events will be carried out by book-entry movement rather than by multiple transfers of securities certificates.

By providing securities depositories with three business days after the expiration of a tender offer, exchange offer, or reorganization event to deliver securities certificates, the proposed

amendments should create a clear and uniform standard for the delivery of securities certificates subject to such events. This standard should give securities depositories greater certainty in managing their certificate inventory after the expiration of a tender offer, exchange offer, or reorganization event.

The proposed amendments to Rule 17Ad-14 should not result in significant costs to any particular person or entity. The Commission estimates that there will be minimal cost to reorganization agents to establish and maintain a specially designated account at a securities depository and otherwise to comply with the proposed amendments.<sup>29</sup> A small number of entities that act as reorganization agents may incur some systems and communications costs but the Commission believes many of those entities already have the necessary systems in place because they provide book-entry services for tender and exchange offers and therefore any such costs should be insignificant. No entity should incur any additional cost because of the proposed amendments to Rule 17Ad-14 that would give securities depositories three days to deliver securities certificates associated with tender offers, exchange offers, and reorganization events. Therefore, the proposed amendments to Rule 17Ad-14 should not have any measurable aggregate cost.

The Commission requests comment on these estimates and invites commenters to submit their own estimates of the costs and benefits that would result from the proposed amendments to Rule 17Ad-14. In particular, the Commission requests comment on whether any entity will incur any additional cost as a result of the proposed amendments to Rule 17Ad-14 that would give securities depositories three days to deliver securities certificates associated with tender offers, exchange offers, and reorganization events. In order to evaluate fully the costs and benefits associated with the proposed amendments, the Commission requests that commenters' estimates of the costs and benefits of the proposed amendments be accompanied by specific empirical data supporting the estimates.

#### V. Summary of Regulatory Flexibility Analysis

The Commission has prepared an initial regulatory flexibility analysis

<sup>29</sup> DTC has informed the Commission staff that it does not charge a fee to establish and maintain a book-entry account.

<sup>25</sup> 806 F. Supp. 460 (S.D.N.Y. 1992). *Pryor* involved a 1981 tender offer by United States Steel Corporation ("U.S. Steel") for shares of Marathon Oil Company. The tender offer was oversubscribed, and the offering document provided that in the event of an oversubscription U.S. Steel would purchase the Marathon shares on a pro-rata basis prior to the proration date. Shareholders permitted to share at the tender offer price were to earn a significant premium on their shares. Thus, as the number of tenderers increased, the number of shares held by each tenderer that would be eligible for sale would decrease. Some tenderers initiated book-entry deliveries of securities prior to the proration date at DTC, but DTC delivered the certificates for these shares subsequent to the proration date. In denying the motions for summary judgment submitted by each of the plaintiff and defendant, the court did not resolve the issue as to whether book-entry delivery of securities prior to the proration date constituted good delivery even though DTC delivered the securities certificates after the proration date. Instead, the court set the matter for trial, but the case was settled.

<sup>26</sup> 15 U.S.C. 78w(a)(2).

<sup>27</sup> 15 U.S.C. 78c.

<sup>28</sup> 1 Pub. L. No. 104-290, 110 Stat. 3416 (1996).

("IRFA") in accordance with 5 U.S.C. 603(a) regarding the proposed amendments to Rule 17Ad-14. The IRFA states that the proposed amendments are intended to facilitate book-entry delivery of securities during reorganization events. In addition, the IRFA states that the proposed amendments are intended to establish a clear and uniform time frame for the delivery of securities certificates that are the subject of tender offers, exchange offers, and reorganization events. The IRFA sets forth the statutory basis for the proposed amendments.

The IRFA states that, for purposes of Commission rulemaking, paragraph (h) of Rule 0-10 under the Exchange Act<sup>30</sup> defines the term "small business" or "small organization" to include any transfer agent that: (1) Received less than 500 items for transfer and less than 500 items for processing during the preceding six months (or in the time that it has been in business, if shorter); (2) transferred items only of issuers that would be deemed "small businesses" or "small organizations" as defined in Rule 0-10 under the Exchange Act; (3) maintained master shareholder files that in the aggregate contained less than 1,000 shareholder accounts or was the named transfer agent for less than 1,000 shareholder accounts at all times during the preceding fiscal year (or in the time that it has been in business, if shorter); and (4) is not affiliated with any person (other than a natural person) that is not a small business or small organization under Rule 0-10.<sup>31</sup> The IRFA states that, for purposes of Commission rulemaking, paragraph (d) of Rule 0-10 under the Exchange Act<sup>32</sup> defines the term "small business" or "small organization" to include any clearing agency that (1) compared, cleared and settled less than \$500 million in securities transactions during the preceding fiscal year (or in the time that it has been in business, if shorter); (2) had less than \$200 million of funds and securities in its custody or control at all times during the preceding fiscal year (or in the time that it has been in business, if shorter); and (3) is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined in Rule 0-10. In addition, the IRFA states that paragraph (a) of Rule 0-10 under the Exchange Act<sup>33</sup> defines the term "small business" or "small organization" to include any person

(i.e., business) that, on the last day of its most recent fiscal year, had total assets of \$5 million or less.

The IRFA states that the Commission estimates that 180 transfer agents qualify as small entities. The IRFA further states that if the proposed amendments are adopted, it is possible that some registered transfer agents that act as reorganization agents will be small entities. In addition, the IRFA states that if the proposed amendments are adopted, it is possible that certain issuers of securities that are subject to reorganization events and some bidders that extend tender or exchange offers will be small entities. However, the IRFA states further that the Commission currently cannot predict how many of the affected issuers and bidders would be small entities.

The IRFA states that the proposed amendments would not impose any new reporting or recordkeeping requirements. The IRFA states further that if the proposed amendments are adopted, registered transfer agents acting as reorganization agents would be required to establish and maintain specially designated accounts at qualified registered securities depositories to provide for book-entry movements of the affected securities during the course of reorganization events. The IRFA states that the proposed amendments to Rule 17Ad-14 should not have a significant economic impact on a substantial number of small entities.

The IRFA states that as an alternative to the proposed amendments the Commission considered requesting that reorganization agents voluntarily accept book-entry delivery of securities affected by reorganization events. However, the IRFA states that it is the Commission's understanding that the agreements governing the terms of some reorganization events currently require or are interpreted to require delivery of securities certificates and that reorganization agents will not accept the affected securities by book-entry delivery in the absence of a Commission rule.

In addition, the IRFA states that the Commission believes that it is not feasible to further clarify, consolidate, or simplify the proposed amendments for small entities. The IRFA also states that the Commission believes that the use of performance standards rather than design standards is not applicable to the proposed amendments. The IRFA states that the Commission believes that creating an exemption from the requirements of the proposed amendments would not reduce the impact of the proposed amendments on

small entities due to the minimal burden they are expected to impose on small entities. The IRFA states that the Commission believes that there are no rules that duplicate, overlap, or conflict with the proposed alternative versions of the rule.

The IRFA contains information concerning the solicitation of comments with respect to the IRFA. In particular, the IRFA requests comment on whether the proposed amendments to Rule 17Ad-14 would have a significant economic impact on a substantial number of small entities and requests that any such comments be accompanied by specific empirical data. Cost-benefit information reflected in the "Cost/Benefit Analysis" section of this Release also is reflected in the IRFA. The IRFA states that in the absence of specific comments to the contrary, the Commission anticipates that if the proposed amendments are adopted it will certify that the proposed amendments will not have a significant economic impact on a substantial number of small entities and will not prepare a Final Regulatory Flexibility Analysis. A copy of the IRFA may be obtained by contacting Theodore R. Lazo, Securities and Exchange Commission, 450 Fifth Street, NW, Mail Stop 10-1, Washington, DC 20549.

## VI. Statutory Bases

The amendments to Rule 17Ad-14 are being proposed pursuant to Sections 2, 11A(a)(1)(B), 14(d)(4), 15(c)(3), 15(c)(6), 17A(a), 17A(d)(1), and 23(a) of the Exchange Act [15 U.S.C. 78b, 78k-1(a)(1)(B), 78n(d)(4), 78o(c)(3), 78o(c)(6), 78q-1(a), 78q-1(d)(1) and 78w(a)].

### List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

### Text of Proposed Amendments

In accordance with the foregoing, the Commission proposes to amend part 240 of Chapter II of Title 17 of the Code of Federal Regulations as follows:

## PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read in part as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78f, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll(d), 78mm, 79q, 79t, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, and 80b-11, unless otherwise noted.

2. Section 240.17Ad-14 is revised to read as follows:

<sup>30</sup> 17 CFR 240.0-10(h).

<sup>31</sup> The Commission recently amended this definition. Securities Exchange Commission Release Nos. 33-7548, 34-40122, IC-23272, and IA-1727 (June 24, 1998), 63 FR 35508.

<sup>32</sup> 17 CFR 240.0-10(d).

<sup>33</sup> 17 CFR 240.0-10(a).

**§ 240.17Ad-14 Tender and reorganization agents**

(a) *Establishing book-entry depository accounts for tender or exchange offers and reorganization events.* (1) When securities of a subject company have been declared eligible by one or more qualified registered securities depositories for the services of those depositories at the time a tender or exchange offer is commenced, no registered transfer agent shall act on behalf of the bidder as a depository, in the case of a tender offer, or an exchange agent, in the case of an exchange offer, in connection with a tender or exchange offer, unless that transfer agent has established, within two business days after commencement of the offer, specially designated accounts. These accounts shall be maintained throughout the duration of the offer, including protection periods, with all qualified registered securities depositories holding the subject company's securities, for purposes of receiving from depository participants securities being tendered to the bidder by book-entry delivery pursuant to transmittal letters and other documentation and for purposes of allowing depositories to return to depository participants by book-entry movement securities withdrawn from the offer.

(2) When securities of an issuer have been declared eligible by one or more qualified registered securities depositories for the services of those depositories at the time a reorganization event is commenced, no registered transfer agent shall act as a reorganization agent on behalf of any issuer in connection with a reorganization event unless that registered transfer agent has established, within two business days after commencement of the reorganization event, specially designated accounts. These accounts shall be maintained with all qualified registered securities depositories holding the issuer's securities until the depository's close of business on the record date, expiration date, or payment date, as the case may be, including any protect periods, of the reorganization event for purposes of receiving from depository participants securities presented to registered transfer agents by book-entry delivery pursuant to proper documentation and for purposes of allowing reorganization agents to return securities to depository participants by book-entry movement in connection with the reorganization event.

(3) No registered transfer agent acting as a depository, exchange agent, or reorganization agent shall require a

qualified registered securities depository to deliver any physical security pursuant to a tender offer, exchange offer, or reorganization event prior to:

(i) In the case of a tender or exchange offer, the third business day following the qualified registered securities depository's close of business on the expiration date of a tender or exchange offer, including any protect periods or

(ii) In the case of a reorganization event, the third business day following the qualified registered securities depository's close of business on the record date, payment date, or expiration date, as applicable, including any protect periods, of the reorganization event.

(b) *Exclusions.* This section shall not apply to tender or exchange offers or reorganization events:

(1) That are made for a class of securities of a subject company or issuer that has fewer than:

(i) 500 security holders of record for that class; or

(ii) 500,000 shares of that class outstanding; or

(2) That are made exclusively to security holders of fewer than 100 shares of a class of securities.

(c) *Definitions.* For purposes of this section:

(1) The terms *bidder*, *subject company*, *business day*, *security holders*, and *transmittal letter* shall have the meanings provided in § 240.14d-1(e);

(2) Unless the context otherwise requires, a tender or exchange offer shall be deemed to have commenced as specified in § 240.14d-2;

(3) The term *qualified registered securities depository* shall mean a registered clearing agency having rules and procedures approved by the Commission pursuant to section 19 of the Act (15 U.S.C. 78s) to enable book-entry delivery of the securities of the subject company or issuer to, and return of those securities from, a transfer agent or reorganization agent, as the case may be, through the facilities of that registered clearing agency;

(4) The term *depository* refers to that agent of the bidder receiving securities from tendering depository participants during a tender offer and paying those participants for shares tendered. The term *exchange agent* refers to the agent performing like functions in connection with an exchange offer. The term *reorganization agent* refers to the agent performing like functions in connection with a reorganization event; and

(5) The term *reorganization event* shall mean and include conversions, maturities, full and partial redemptions,

calls, put option exercises, and warrant and rights exercises involving corporate and municipal securities of an issuer.

(d) *Exemptions.* The Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any registered transfer agent, reorganization agent, tender or exchange offer, class of tender or exchange offers, or reorganization event if the Commission determines that an exemption is consistent with the public interest, the protection of investors, the prompt and accurate clearance and settlement of securities transactions, the maintenance of fair and orderly markets, or the removal of impediments to a national clearance and settlement system.

Dated: August 31, 1998.

By the Commission.

**Margaret H. McFarland,**

*Deputy Secretary.*

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**DEPARTMENT OF THE TREASURY**
**Internal Revenue Service**
**26 CFR Part 1**

[REG-101363-98]

RIN 1545-AV94

**Section 411(d)(6) Protected Benefits (Taxpayer Relief Act of 1997); Qualified Retirement Plan Benefits**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking by cross-reference to temporary regulations.

**SUMMARY:** In the Rules and Regulations section of this issue of the **Federal Register**, the IRS is issuing temporary regulations providing for changes to the rules regarding qualified retirement plan benefits that are protected from reduction by plan amendment, that have been made necessary by the Taxpayer Relief Act of 1997. The text of those temporary regulations also serves as the text of these proposed regulations.

**DATES:** Written comments and requests for a public hearing must be received by December 3, 1998.

**ADDRESSES:** Send submissions to: CC:DOM:CORP:R (REG-101363-98), room 5228, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R (REG-101363-98),