

## DEPARTMENT OF JUSTICE

## Immigration and Naturalization Service

## 8 CFR Parts 3, 236, 240, and 241

[INS NO. 1847-97; AG Order No. 2176-98]

RIN 1115-AE82

## Surrender of Aliens Ordered Removed From the United States

AGENCY: Immigration and Naturalization Service, Department of Justice.

ACTION: Proposed rule.

**SUMMARY:** This rule proposes to amend the Immigration and Naturalization Service regulations by requiring aliens subject to a final order of removal to surrender to the Service. This rule also establishes procedures for surrender, and bars persons violating these procedures from obtaining discretionary immigration benefits.

**DATES:** Written comments must be submitted on or before November 3, 1998.

**ADDRESSES:** Please submit written comments, in triplicate, to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 "I" Street NW., Room 5307, Washington, DC 20536. To ensure proper handling, please reference INS number 1847-97 on all correspondence. Comments are available for public inspection at the above address by calling (202) 514-3048 to arrange for an appointment.

**FOR FURTHER INFORMATION CONTACT:** William C. Birkett, Office of the General Counsel, Immigration and Naturalization Service, 425 "I" Street NW., Room 6100, Washington, DC 20536, telephone (202) 514-5001.

**SUPPLEMENTARY INFORMATION:** This proposed rule establishes procedures requiring aliens who have received a final order of removal to surrender to the Immigration and Naturalization Service (Service) for removal from the United States. Section 241(a) of the Immigration and Nationality Act (Act), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), generally requires the detention and removal of aliens subject to a final order of removal within 90 days. Some aliens, however, may not be in Service custody at the time that the order of removal becomes administratively final.

Although the Service may apprehend and detain an alien subject to a final order of removal at any time to enforce the order, the proposed rule is necessary to clarify that an alien not detained at the time that an order of removal

becomes final has a legal obligation to surrender expeditiously thereafter for removal. Proposed § 241.13 requires surrender within specified periods after the removal order becomes final. The periods specified concern the alien's obligation to surrender, and in no way limit the Service's authority to enforce a final order of removal at any time. Generally, surrender will be to the Service district office with jurisdiction over the place where the immigration judge completed the removal proceeding, but the Service may, in its discretion, specify an alternate location or other term of surrender. Such alternative locations and terms may be necessary, for example, to expedite processing and removal (often by mutual agreement of the parties). When the Service changes the location and terms of surrender, the Service will notify the alien of the new terms of surrender in person or by regular mail at the last address the alien provided to the Service. This notice requirement, however, will not restrict the Service's authority under section 241(a) to arrest and remove the alien at any time.

In general, the proposed rule provides that the period of time for surrender will be 10 calendar days from the date of the final order from the Immigration Judge or the Board of Immigration Appeals. If the final day for surrender falls on a Saturday, Sunday, Federal holiday, or other day when the Service office designated for surrender is closed, the alien must surrender on the first business day thereafter. An alien who violates an order granting voluntary departure must surrender on the business day following the date the alternate order of removal becomes effective. These periods of time, as with other conditions of surrender, are subject to change in accordance with 8 CFR 241.13(h).

The Department welcomes, in particular, comments from bonding companies concerning the effect the proposed rule would have on their obligation to produce bonded aliens.

Proposed § 241.14 provides for notice of the duty to surrender in the Notice to Appear, and at various points during the removal proceeding. The duty to surrender attaches upon service of the Notice to Appear pursuant to section 239(a)(1) of the Act, and does not depend upon receipt of any of the subsequent notices. Proposed § 241.14(b)(2) provides that the immigration judge will notify the alien of the location to which the alien must surrender in the event that the alien becomes subject to a final order of removal.

Proposed § 241.15 bars an alien failing to comply with the duty to surrender from discretionary relief under sections 208, 212(h), 212(i), 240A, 240B, 245, 248 and 249 of the Act at any time while he or she is still in the United States, and for 10 years from the time of any subsequent departure. The Attorney General is authorized to exercise her broad discretion over immigration matters through rulemaking to resolve matters of general applicability. "It is a well-established principle of administrative law that an agency to whom Congress grants discretion may elect between rulemaking and ad hoc adjudication to carry out its mandate." *Yang v. INS*, 79 F.3d 932, 936 (9th Cir. 1996) (citing *American Hosp. Assoc. v. NLRB*, 499 U.S. 606, 611-13 (1991)). Agencies may resolve matters of general applicability through the promulgation of rules "even if a statutory scheme requires individualized determination \* \* \* unless Congress has expressed an intent to withhold that authority." *American Hosp. Assoc. v. NLRB*, *supra*. This principle has been recognized by courts reviewing the Department's rulemaking under the Act. *Reno v. Flores*, 507 U.S. 292 (1993) (holding that promulgation of rule precluding the release of detained juveniles to anyone other than parents, close relatives, and guardians is a permissible exercise of Attorney General's discretion); *Yang, supra*, (holding that promulgation of rule denying asylum to aliens who were firmly resettled prior to arrival in the U.S. is a permissible exercise of Attorney General's discretion).

Denying discretionary forms of relief to aliens who fail to surrender for removal is a rational exercise of the Attorney General's discretion. Aliens subject to a final order who fail to surrender for removal as required by the Attorney General are fugitives from justice who frustrate her efforts to enforce the Act. *See, e.g., Bar-Levy v. INS*, 990 F.2d 33, 34 (2d Cir. 1993) (holding that court would exercise its discretion to dismiss appeal because petitioner, as an alien who failed to surrender for deportation, was a "fugitive from justice"); *Ruiz-Rivera v. Moyer*, 70 F.3d 498, 500 (7th Cir. 1995) (noting, in action brought by bond obligor challenging INS decision to forfeit her bond, that court had denied emergency motion to stay deportation filed by the subject of the bond because after failing to surrender he became a "fugitive" undeserving of the resources of the court). The Attorney General expends considerable resources detecting and apprehending inadmissible and deportable aliens, and

provides extensive procedural protections to ensure that the claims of those contesting removal are properly adjudicated. By denying discretionary relief to aliens who fail to surrender for removal, the proposed rule will recognize the serious nature of their disregard for her authority, see § 243(a)(1) of the Act (providing criminal penalties in the form of fine or imprisonment for failing to surrender for removal as required by the Attorney General), as well as the Attorney General's interest in discouraging behavior that impedes her ability to enforce the Act effectively.

The proposed exercise of discretion is also consistent with the statutory bars to relief existing in the Act, as well as a precedent decision of the Board of Immigration Appeals. Section 240(b)(7) of the Act bars aliens who fail to appear for a removal proceeding from relief under sections 240A (cancellation of removal), 240B (voluntary departure), 245 (adjustment of status), 248 (change of status), and 249 (registry) of the Act for ten years after the date of entry of the final order of removal. Section 240B(d) of the Act bars aliens who fail to depart in the time specified under an order of voluntary departure from relief for ten years under the same sections of the Act. In *Matter of Barocio*, 19 I&N 255 (BIA 1985), the Board of Immigration Appeals held that aliens who fail to appear for deportation after notification by the Service do not merit the favorable exercise of discretion necessary to reopen deportation proceedings.

Section 241.15 also provides for a waiver of the bars to relief, in the discretion of the district director, upon demonstration that the failure to surrender was due to exceptional circumstances beyond the control of the alien. An alien who failed to surrender for removal whose case is subsequently reopened by an immigration judge or the Board of Immigration Appeals will not be subject to the bars to discretionary relief.

Proposed § 241.16 contains certain rules of construction. Nothing in this rule is intended to abrogate the Service's duty to stay removal where required by the Act, or as ordered by an immigration judge, the Board of Immigration Appeals, or a Federal Court. In addition, surrendering in compliance with this rule does not operate to disqualify an alien from any benefit to which he or she is otherwise entitled under the Act.

Revisions to four other sections of title 8 are necessary in order to implement fully the duty to surrender for removal. Proposed § 3.2(c)(5) generally precludes reopening removal proceedings by the Board of

Immigration Appeals in the case of an alien who fails to surrender for removal. Proposed § 3.23(b)(5) generally precludes reopening proceedings by an immigration judge in the case of an alien who fails to surrender for removal. In each instance, a motion to reopen is not precluded if the alien demonstrates by clear and convincing evidence both that the failure to surrender was due to exceptional circumstances beyond the control of the alien, and that the alien surrendered for removal as soon as possible after the circumstance that prevented a timely surrender had passed. This is consistent with existing precedent of the Board of Immigration Appeals recognizing that aliens who violate a lawful order of deportation by failing to report for removal do not merit the favorable exercise of discretion required to reopen proceedings. Failing to surrender also does not preclude reopening if a district director waives the disabilities for doing so in accordance with proposed § 241.15(c).

Proposed § 236.1(a)(6) provides that no alien may be released from custody without agreeing to surrender for removal in accordance with this rule. This rule also proposes to amend § 240.26(a) to require that all aliens seeking voluntary departure agree to surrender for removal in accordance with § 241.13.

The regulations regarding surrender are critical to the removal process, but the initial design of these processes has involved complex logistical coordination both within the Service and between the Service and the Executive Office for Immigration Review (EOIR). As a consequence, the provisions contained in this proposed rule were not ready for publication with the interim rule implementing IIRIRA at 62 FR 10312, and are now being published as a separate proposed rule to ensure adequate opportunity for full public notice and comment.

Prior to the effective date of this rule, those failing to report for final orders of removal will be subject to existing law, including the precedent decisions of the Board of Immigration Appeals regarding limitations on discretionary relief for such persons. The procedures proposed by this rule will apply only to those issued a Notice to Appear on or after the final rule's effective date.

#### **Regulatory Flexibility Act**

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities because it

affects legal obligations of individual aliens ordered removed from the United States, not small entities.

#### **Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### **Small Business Regulatory Enforcement Fairness Act of 1996**

This rule is not a major rule as defined by the Small Business Regulatory Enforcement Act of 1996 (5 U.S.C. 804(2)). This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### **Executive Order 12866**

This rule is considered by the Department of Justice to be a "significant regulatory action" under Executive Order 12866, Regulatory Planning and Review. Accordingly, this regulation has been submitted to the Office of Management and Budget for review.

#### **Executive Order 12988: Civil Justice Reform**

This proposed rule meets the application standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### **Executive Order 12612: Federalism**

It is determined, in accordance with Executive Order 12612, that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

#### **List of Subjects**

##### *8 CFR Part 3*

Administrative practice and procedure, Immigration, Organization and functions (Government agencies).

##### *8 CFR Part 236*

Administrative practice and procedure, Aliens, Immigration.

8 CFR Part 240

Administrative practice and procedure, Aliens, Immigration.

8 CFR Part 241

Administrative practice and procedure, Aliens, Immigration.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for part 3 continues to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1103, 1226, 1362; 28 U.S.C. 509, 510, 1746; sec. 2, Reorg. Plan No. 2 of 1950, 3 CFR, 1949–1953 Comp., p. 1002.

2. Section 3.2 is amended by adding new paragraph (c)(5) to read as follows:

§ 3.2 Reopening or Reconsideration before the Board of Immigration Appeals.

\* \* \* \* \*

(c) \* \* \*

(5) Failure to surrender for removal. A motion to reopen removal proceedings will not be granted in the case of an alien who failed to surrender for removal in accordance with § 241.13 of this chapter, unless:

(i) The district director waived the consequences for failing to surrender for removal in accordance with § 241.15(c) of this chapter; or

(ii) The alien presents documentary evidence that demonstrates, by clear and convincing evidence, that

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

(B) The alien surrendered for removal as soon as possible after the circumstances that prevented a timely surrender had passed.

(iii) Nothing in paragraph (c)(5)(ii) of this section may be construed as providing the right to reopen a proceeding solely to consider whether an alien complied with the duty to surrender for removal, or whether exceptional circumstances excuse the alien's failure to do so.

\* \* \* \* \*

3. Section 3.23 is amended by adding new paragraph (b)(5) to read as follows:

§ 3.23 Reopening for reconsideration before the Immigration Court.

\* \* \* \* \*

(b) \* \* \*

(5) Failure to surrender for removal. A motion to reopen removal proceedings will not be granted in the case of an alien who failed to surrender for removal in accordance with § 241.13 of this chapter, unless:

(i) The district director waived the consequences for failing to surrender for removal in accordance with § 241.15(c) of this chapter; or

(ii) The alien presents documentary evidence that demonstrates, by clear and convincing evidence, that

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

(B) The alien surrendered for removal as soon as possible after the circumstances that prevented a timely surrender had passed.

(iii) Nothing in paragraph (b)(5)(ii) of this section may be construed as providing the right to reopen a proceeding solely to consider whether an alien complied with the duty to surrender for removal, or whether exceptional circumstances excuse the alien's failure to do so.

PART 236—APPREHENSION AND DETENTION OF INADMISSIBLE AND DEPORTABLE ALIENS; REMOVAL OF ALIENS ORDERED REMOVED

4. The authority citation for part 236 continues to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1224, 1225, 1226, 1227, 1362; 8 CFR part 2.

5. Section 236.1 is amended by redesignating paragraphs (c) (1), (2), (3), (4), and (5) as (c) (1), (2), (3), (4), (5), and (6) respectively, and by adding, after the heading "Custody issues and release procedures", the following new paragraph (c)(1), to read as follows:

§ 236.1 Apprehension, custody, and detention.

\* \* \* \* \*

(c) \* \* \*

(1) No alien may be released from custody unless the alien agrees to surrender for removal in accordance with § 241.13 of this chapter should the alien become subject to a final order of removal.

\* \* \* \* \*

PART 240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES

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

Authority: 8 U.S.C. 1103; 1182, 1186a, 1224, 1225, 1226, 1227, 1251, 1252 note, 1252a, 1252b, 1362; 8 CFR part 2.

7. Section 240.26 is amended by adding a sentence at the end of paragraph (a), to read as follows:

§ 240.26 Voluntary departure—authority of the Executive Office for Immigration Review.

(a) \* \* \* In addition, no alien may be granted voluntary departure unless the alien agrees to surrender for removal in accordance with § 241.13(c) of this chapter.

\* \* \* \* \*

PART 241—APPREHENSION AND DETENTION OF ALIENS ORDERED REMOVED

8. The authority citation for part 241 continues to read as follows:

Authority: 8 U.S.C. 1103, 1223, 1227, 1251, 1253, 1255, and 1330; 8 CFR part 2.

9. In part 241, subpart A, a new § 241.13 is added to read as follows:

§ 241.13 Duty to surrender.

Aliens subject to a final order of removal shall be taken into custody by the Service and removed. If not in the custody of the Service, however, aliens subject to a final order of removal must surrender for removal as provided in this section. Such surrenders must be made during regular business hours to the Service district office with jurisdiction over the place where the immigration judge completed the removal proceeding. Nothing in this part shall be construed as limiting the Service's authority to enforce a final order of removal at any time.

(a) Immigration Judge.—(1) Aliens waiving appeal and aliens ordered removed in absentia. Aliens served with an order of removal issued by an immigration judge who waive appeal of the order, and aliens who are ordered removed in absentia, must surrender for removal within 10 calendar days of date of the order.

(2) Aliens reserving appeal. Aliens who reserve appeal and are served with an order of removal issued by an immigration judge that becomes final due to expiration of the time to file an appeal must surrender for removal within 10 calendar days of the date that the appeal period expires. Aliens who reserve appeal and are served with an order of removal issued by an immigration judge that becomes final due to a subsequent waiver or withdrawal of appeal must surrender for removal within 10 calendar days of the date that the order becomes final.

(b) Board of Immigration Appeals. Aliens who are served with an order of removal, or an order dismissing an appeal from an order of removal, issued by the Board of Immigration Appeals must surrender for removal within 10 calendar days of the date of the order.

(c) *Voluntary departure.* Notwithstanding paragraphs (a) and (b) of this section, an alien granted voluntary departure who subsequently becomes subject to an alternate order of removal due to failure to depart as directed, failure to pay a bond in connection with voluntary departure, or failure to comply with any other required condition or term in connection with voluntary departure, must surrender for removal on the next business day thereafter.

(d) *Aliens in custody.* (1) An alien who becomes subject to a final order of removal while in Service custody is thereby relieved of the duty to surrender for removal under this section.

(2) An alien who becomes subject to a final order of removal while incarcerated in a local, State, or Federal facility must surrender for removal within 10 calendar days of the alien's release from that facility, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense, unless the alien is detained by the Service at the time he or she is released. If the alien is detained by the Service at the time of release from a local, State, or Federal facility, the alien is thereby relieved of the duty to surrender for removal pursuant to paragraph (d)(1) of this section.

(e) *Other orders of removal.* Subject to paragraph (d) of this section, aliens who are ordered removed, other than by an immigration judge or the Board of Immigration Appeals, must surrender for removal to the Service district office with jurisdiction over the place where the alien was ordered removed within 10 calendar days of the date that the order becomes final.

(f) *Requests for relief subsequent to final order of removal.* An application for discretionary or other relief, including a motion to reopen, submitted by an alien to the Service, an immigration judge, or the Board of Immigration Appeals will have no effect on an alien's duty to surrender unless the alien has been served, prior to the expiration of the period to surrender, with a response granting the requested relief. A request for modification of the surrender terms submitted by an alien to the Service will have no effect on an alien's duty to surrender unless the alien has been served, prior to the expiration of the period to surrender, with a response granting the requested relief. The filing of a petition for review or writ of habeas corpus will likewise have no effect on an alien's duty to surrender for removal.

(g) *Weekends and holidays.* If the last permissible day to surrender for removal falls on a Saturday, Sunday, Federal holiday, or other day when the Service office designated for surrender is closed, the alien must surrender for removal on the first business day thereafter.

(h) *Alternative surrender terms.* Nothing in this part may be construed as limiting the Service's authority, in its sole and unreviewable discretion, to impose surrender requirements in addition to or varying from those generally applicable under this section. Changes to the surrender requirements may be made by mutual consent of the parties or, if without the alien's consent, the Service shall notify the alien in person or by regular mail at the last address given to the Service by the alien. This notice requirement shall not affect the Service's ability to arrest and remove an alien described in section 241(a) of the Immigration and Nationality Act at any time.

10. In part 241, subpart A, a new § 241.14 is added to read as follows:

**§ 241.14 Notice of duty to surrender.**

(a) *Notice to Appear.* The Notice to Appear, Form I-862, will contain written notice of the duty to surrender.

(b) *Immigration judge.* (1) The immigration judge will inform the alien orally and in writing that if the alien fails to appear for a hearing, and thereby becomes subject to a final order of removal, the alien will be required to surrender for removal.

(2) In any case in which an immigration judge renders a decision, whether or not adverse to the alien, the immigration judge will inform the alien orally and in writing of the duty to surrender for removal and the location to which the alien must surrender in the event that the alien becomes subject to a final order of removal.

(c) *Board of Immigration Appeals.* Orders of removal, and orders dismissing an appeal from an order of removal, issued by the Board of Immigration Appeals will contain written notice of the duty to surrender for removal.

(d) *Upon release from custody.* As a condition of release from custody, whether under terms directed by the Service or subsequent to redetermination by an immigration judge or the Board of Immigration Appeals, the alien released must agree to surrender for removal if the alien becomes subject to a final order of removal. No alien will be released from custody without agreeing to surrender for removal as required by this part.

(e) *Upon grant of voluntary departure.* No alien may be granted voluntary departure, whether by an immigration judge or the Board of Immigration Appeals, unless the alien agrees to surrender for removal as provided under § 241.13(c) should the alien become subject to an alternate order of removal due to failure to depart as directed, failure to pay a bond in connection with voluntary departure, or failure to comply with any other required condition or term in connection with voluntary departure.

(f) *Duty to surrender not contingent upon notice.* The duty to surrender for removal attaches upon service of a Notice to Appear pursuant to the terms of section 239(a)(1) of the Act, and is not contingent upon receipt of any of the notices enumerated in this section. If the address of the Service district office to which the alien is required to surrender changes subsequent to issuance of the notice in § 241.14(b)(2), it is the alien's duty to determine the new address and surrender to that location.

11. In part 241, subpart A, a new § 241.15 is added to read as follows:

**§ 241.15 Consequences of failure to surrender for removal; exception; waiver.**

(a) *Consequences.* (1) An alien who fails to surrender for removal as required by this part, and who remains in the United States in violation of law, is:

- (i) Subject to criminal prosecution under section 243 of the Act;
- (ii) Subject to civil penalties under section 274D of the Act; and
- (iii) Ineligible for discretionary relief under sections 208, 212(h), 212(i), 240A, 240B, 245, 248 and 249 of the Act.

(2) An alien who departs or is removed by the Service after failing to surrender for removal as required by this part is ineligible for the relief specified in paragraph (a)(1)(iii) of this section for 10 years after the alien's departure or removal.

(b) *Exception.* An alien who fails to surrender for removal as required by this part is not ineligible for the relief specified in paragraph (a)(1)(iii) of this section if the underlying proceeding was reopened by the Board of Immigration Appeals in accordance with § 3.2(c)(5) of this chapter or an immigration judge in accordance with § 3.23(b)(5) of this chapter, provided that the alien does not again fail to surrender for removal subsequent to reopening of the underlying proceeding.

(c) *Waiver.* The consequences of failing to surrender for removal may be waived, in the sole and unreviewable discretion of the district director, if:

(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.*

[FR Doc. 98-23906 Filed 9-3-98; 8:45 am]

BILLING CODE 4410-10-M

**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 tender 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

<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