Commission hereby amends the Code of Federal Regulations, Title 16, Chapter II, Subchapter D, as follows:

PART 1615—STANDARD FOR THE FLAMMABILITY OF CHILDREN'S SLEEPWEAR: SIZES 0 THROUGH 6X (FF 3-71)

Part 1615. Subpart B is amended by revising § 1615.31(b)(1) to read as follows:

§ 1615.31 Labeling, recordkeeping, advertising, retail display, and guarantees.

(b) Labeling. (1) Where any agent or treatment is known to cause deterioration of flame resistance or otherwise causes an item to be less flame resistant, such item shall be prominently, conspicuously, and legibly labeled with precautionary care and treatment instructions to protect the item from such agent or treatment: Provided:...

(ii) Where items are required to be labeled in accordance with this paragraph, the precautionary care and treatment instructions may appear on the reverse side of the permanent label if

(A) The precautionary care and treatment instructions are legible, readily visible, prominently, and conspicuously.

(B) The phrase "Care Instructions On Reverse" or the equivalent appears prominently, conspicuously, and legibly on the side of the permanent label that is visible to the prospective purchaser when the item is marketed at retail, and the required label is not readily visible to the prospective purchaser and exchange offers have been processed in such a manner that the prospective purchaser is able to manipulate the label so the entire text of the precautionary care and treatment instructions is visible and legible; however, where the label cannot be manipulated so the instructions are visible to the prospective purchaser and exchange offers have been processed in such a manner that the prospective purchaser is able to manipulate the label so the entire text of the precautionary care and treatment instructions is visible and legible; however, where the label cannot be manipulated so the instructions are visible to the prospective purchaser and legible, the package must also be prominently, conspicuously, and legibly labeled with the required precautionary care and treatment information or such information must appear prominently, conspicuously, and legibly on a hang tag attached to the item.

PART 1616—STANDARD FOR THE FLAMMABILITY OF CHILDREN'S SLEEPWEAR: SIZES 7 THROUGH 14 (FF 5-74)

Part 1616. Subpart B is amended by revising § 1616.31(b)(1) and (4) to read as follows:

§ 1616.31 Labeling, recordkeeping, retail display, and guarantees.

(b) Labeling. (1) Where any agent or treatment is known to cause deterioration of flame resistance or otherwise causes an item to be less flame resistant, such item shall be prominently, conspicuously, and legibly labeled with precautionary care and treatment instructions to protect the item from such agent or treatment: Provided:...

(ii) Where items are required to be labeled in accordance with this paragraph, the precautionary care and treatment instructions may appear on the reverse side of the permanent label if

(A) The precautionary care and treatment instructions are legible, prominently, and conspicuously.

(B) The phrase "Care Instructions On Reverse" or the equivalent appears prominently, conspicuously, and legibly on the side of the permanent label that is visible to the prospective purchaser when the item is marketed at retail, and the required label is not readily visible to the prospective purchaser and exchange offers have been processed in such a manner that the prospective purchaser is able to manipulate the label so the entire text of the precautionary care and treatment instructions is visible and legible; however, where the label cannot be manipulated so the instructions are visible to the prospective purchaser and exchange offers have been processed in such a manner that the prospective purchaser is able to manipulate the label so the entire text of the precautionary care and treatment instructions is visible and legible; however, where the label cannot be manipulated so the instructions are visible to the prospective purchaser and legible, the package must also be prominently, conspicuously, and legibly labeled with the required precautionary care and treatment information or such information must appear prominently, conspicuously, and legibly on a hang tag attached to the item.

4(ii) Where items required to be labeled in accordance with paragraphs (b)(2), and/or (b)(3) of this section and fabrics required to be labeled or stamped in accordance with paragraph (b)(7) of this section are marketed at retail in packages, and the required label or stamp is not readily visible to the prospective purchaser, the packages must also be prominently, conspicuously, and legibly labeled with the required information...


Dated January 19, 1984

Sadie E. Dunn.
Securities and Exchange Commission

BILLING CODE 6815-01-M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200 and 240

[Release No. 34-20581, File No. S7-969]

Processing of Tender Offers Within the National Clearance and Settlement System

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Commission is adopting Rule 17Ad-14 under the Securities Exchange Act of 1934 (the "Act"). The rule requires transfer agents acting on behalf of issuers as tender agents to establish and maintain special accounts with all qualified registered securities depositories holding the subject company's securities. These accounts will permit depositary participants to move securities to and from the tender agent by book-entry. The rule is intended to reduce substantially processing costs and trading market inefficiencies that have occurred when tender and exchange offers have been processed in a physical-book-entry environment.

EFFECTIVE DATE: March 1, 1984.


which the Commission solicited comments on: (i) The causes and effects of clearance and settlement and secondary trading market inefficiencies that occur when tender offers are not processed by book-entry; and (ii) proposed Rule 17Ad-14. The Commission received 38 comment letters from banks, broker-dealers, industry associations, clearing agencies (including securities depositories), corporations that have participated in tender offers, transfer agents, and individuals.2 Virtually all commentators favored prompt adoption of the proposed rule. As discussed in more detail below, many of these letters included thoughtful suggestions about technical aspects of the rule as well as discussions of the securities processing problems generally associated with tender offers and related issues. The Commission has addressed all of the commenters' principal concerns in this release.

I. Background

As discussed in detail in the Proposing Release,3 when a bidder's depository 4 fails to establish an account with a securities depository, all of the subject company's securities must be tendered in physical certificate form, rather than by book-entry, causing a number of problems for securityholders, broker-dealers, bidders, tender agents, and others. For example, securityholders often have great difficulty obtaining properly denominated physical certificates for tender to the bidder's depository prior to the offer's expiration date.5 In addition, inventory management problems at securities depositories compelled those depositories to declare the subject company's securities ineligible for deposit. That declaration forces buyers and sellers of securities in the secondary market to settle individual trades by delivering physical certificates and deprives broker-dealers of the tremendous cost savings and enhanced efficiencies available through settling net obligations by book-entry.6 Further, the unavailability of book-entry settlement processing results in a substantially higher number of fails to deliver between broker-dealers. Consequently, broker-dealers that are unable to obtain certificates to satisfy tender or other obligations must buy securities in the cash market (for same day delivery),7 often creating significant disparities between the cash-market price and the regular-way market price of the target company's securities.

Many of these securities processing problems and market distortions can be avoided when the subject company's securities remain eligible for automated clearing agency processing during the tender offer. The Depository Trust Company ('DTC'), a securities depository registered with the Commission as a clearing agency, operates a system—called the Voluntary Offering Program ('VOP')—that allows tender offers to be handled by centralized book-entry, rather than by universal delivery of physical certificates.8 In general, each bidder, its depository (or exchange agent), and DTC agree on the procedures to be followed in processing each tender offer. By permitting participants to tender securities to the bidder's agent through DTC by book-entry, the VOP mitigates many of the problems discussed above.9 

In the Proposing Release, the Commission expressed its view that bidders and their agents should be encouraged voluntarily to use depository tender offer programs, such as the VOP, so that bidders, depositaries, registered transfer agents, and the investing public could enjoy the benefits of such programs.10 The Commission recognized, however, that because of the one-time transactional nature of tender offers, bidders may decide not to have their agents use automated book-entry processing for those offers. Accordingly, for this and other reasons,11 the Commission proposed Rule 17Ad-14.

Rule 17Ad-14 would require a registered transfer agent,12 acting as a tender agent for a bidder (i.e., as a depository, in connection with a cash tender offer, or as an exchange agent, in connection with a registered exchange offer), to establish with all qualified registered securities depositories 13 special accounts for the book-entry movement of tendered securities between that agent and depository participants.14 The tender agent would have to establish the account within two business days after the offer is commenced.15

As indicated above, virtually all of the commenters supported adoption of Rule 17Ad-14 at this time.16 In addition, the Commission's Advisory Committee on Tender Offers reviewed Proposed Rule 17Ad-14 and stated that it: supports the use of book-entry delivery of tendered securities to the extent practicable and in concept favors (without commenting on the technical aspects of the proposal) proposed Rule 17Ad-14 that would require bidders' tender agents to establish during tender offers an account with qualified registered securities depositories to permit financial institutions participating in such depository systems to use the services of the depository to tender shares, if desired.17

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2 See File No. 37-2999
3 For a thorough discussion of the Proposing Release and trade processing problems that arise when depository book-entry services are not used during tender offers see Proposing Release supra note 1 at 17803-49.
4 For a description of services performed by the bidder's depository see Proposing Release supra note 1 at 17806-89.
5 See 46 FR at 17605-17608. For example, securities depositories hold large-denomination certificates (jumbo certificates) in their vaults representing aggregated participants' positions. The securities depositories may not be able to accommodate a participant's withdrawal request for a certificate of a specified denomination until a jumbo certificate has been presented to the transfer agent for breakdown and reposed in smaller denominations. These processing delays may impact a participant's ability to tender securities before the offer expires.
6 See id at 17611
7 See id at 17606-17608 for a detailed description of the VOP.
8 See Proposing Release supra note 1 at 17607
9 The VOP also accommodates special requests of the parties involved in the tender offer such as preventing the bidder's depository from settling tenders to third parties where certificates representing tendered stock until participants' withdrawal rights have expired. See id at 17609-11
10 See id at 17606-17608
11 See id at 17609-11
12 See Sections 311c(4)(25) and 17Ad(1) of the Act
13 A qualified registered securities depository under proposed Rule 17Ad-14 is a registered clearing agency that at the time a tender offer is commenced under Rule 14d-2 of the Act (17 CFR 240 14d-2) has an automated tender offer processing program approved by the Commission pursuant to Section 10(b) of the Act. The program must provide for book entry delivery, and any needed return of the subject company's securities. Currently, only one securities depository (DTC) is approved. A registered securities depository under Rule 17Ad-14. See Proposed Release supra note 1 at 44. Ultimately, the Commission expects all registered depositories to provide book entry services.
14 See id at 17606-17608
15 See id at 17609-11
16 See id at 17606-17608
17 A major industry association for transfer agents strongly endorsed adoption and implementation of proposed Rule 17Ad-14. See letter to Dan W. Schneider, Division of Market Regulation SEC from Nicholas C. Baldwin, President SIA December 6, 1984.
II. The Need for Rule 17Ad-14

A. Problems Resulting From Use of Physical Certificates

As discussed more fully in the Proposing Release, when a bidder's agent does not establish an account with a securities depository for the book-entry delivery of securities and the depository thereafter declares the securities ineligible, tender offer and trade processing problems often result. Many commenters indicated that processing physical certificates outside the book-entry environment is risky and inefficient. They noted their loss experience in offers in which they could not obtain properly denominated certificates in time to deliver them to the tender agent before the end of the "protect period." They emphasized that such problems are exacerbated in competing offers, when tenderors attempt to withdraw securities from the agent for one bidder and submit them to the agent for the other bidder.

In addition, commentators stated that when a bidder or its agent fails to establish an account with a securities depository and the depository thereafter declares the securities ineligible, trade processing problems occur that make it more difficult to settle secondary market transactions on time. In particular, the unavailability of modern automated clearance and settlement systems results in a substantial increase in the number of fails to deliver between broker-dealers. This, in turn, forces firms to incur substantial financing costs. In addition, because of the absence of an adequate supply of physical certificates during competing offers, it becomes increasingly difficult to settle secondary market transactions and options exercises in a timely manner. Commenters explained that fewer physical certificates generally are available because, among other reasons, many have been tendered by securityholders to the tender agent. At the same time, the demand for certificates multiplies as certificates are needed to settle the increased number of trades, including options exercises, and to cover buy-ins. Under these circumstances, the number of persons who cannot obtain certificates to satisfy their settlement obligations may rise dramatically. The inability to obtain certificates during competing tender offers became so severe in one instance, that OCC resorted to its extraordinary cash settlement procedures to eliminate participants' obligations to obtain certificates.

B. Benefits of Rule 17Ad-14

Every commenter stated that the processing of tender offers by book-entry would afford significant benefits to the securities industry and to the investing public. For example, the Securities Industry Association ("SIA") Operations Committee stated that it "has always been a strong advocate of the expansion of book-entry systems . . . ." Requiring [tender] agents to accept [securities] by book-entry, would in our opinion, be a major step in eliminating many of the operational problems associated with tendering securities.

Commenters generally noted that DTC's existing VOP greatly simplifies tender offer and trade processing. Some commenters also discussed specific significant or additional benefits afforded to the financial community by using the VOP. For example, several commenters indicated that, during competing bids, depository processing of tendered securities could permit return and re-tender of withdrawn securities almost simultaneously and without the inefficiencies and delays associated with receiving physical certificates from the tender agent and redelivering them to another bidder. Another commenter indicated that the VOP permits bidders to pay tendering depository participants more quickly which, in turn, enables participants to pay their customers faster. These comments support the views stated in the Proposing Release regarding the cost savings, enhanced safety, and tender offer and trade processing efficiencies afforded by the VOP. Accordingly, the Commission
believes that the VOP offers important benefits to the financial community and to the investing public and that widespread use of those programs must become routine. 

C. Non-Use of Existing VOPs and Mandatory Use of Securities Depositories

Because the VOP provides a solution to the problems discussed in the Proposing Release, and because the VOP offers such substantial benefits to the financial community, the Commission's Proposing Release requested comment on why DTC's existing VOP had not been used in some tender offers. Commenters provided several explanations—some of an economic nature and some of a procedural nature. They included the following: (i) Since payment for tendered securities would be made by the bidder to the securities depository, tender agents would not be able to earn interest overnight on funds paid for those securities prior to distribution; (ii) tender agents earned less revenue by using DTC's VOP, since their fees commonly were based on the number of letters of transmittal submitted to them; (iii) some transfer agents and bidders were unfamiliar with, or did not understand the mechanics or advantages of, book-entry processing;28 (iv) tender agents located outside of New York City may experience some delays in reconciling their books with DTC;29 (v) bidders have been concerned that book-entry transfer at DTC would be subject to New York State's stock transfer tax;30 and (vi) bidders and their agents had no incentive to standardize their operating procedures to be compatible with book-entry processing.

The Commission believes that the reasons offered for the failure to use the VOP suggest a degree of unfamiliarity with the VOP and its benefits and do not suggest any inherent weakness in, or substantive objection to, that program. Indeed, increased use of the VOP in recent years has demonstrated the advantages of the VOP. In addition, many responses to the Proposing Release concerned the operational details of processing particular tender offers. However, for the time being at least, the Commission believes that such particular refinements should be resolved through conversations between bidders' agencies and the securities depository and not through Rule 17Ad-14. In addition, the Commission recognizes that processing tender offers outside of a depository environment creates special revenues for tender agents that may be reduced by the rule.31 The Commission understands, however, that the principal loss of revenue will result from transferring the float from bidders' agents to tenderors through timely payment mechanisms. We further believe such prompt payment constitutes an important and appropriate public benefit associated with the use of the VOP.

The Commission acknowledges that DTC's VOP may occasionally produce minor operating problems or temporary record discrepancies for tender agents. For example, one commenter noted that tender agents located outside of New York City may be disadvantaged when examining letters of transmittal submitted by tendering participants. Since DTC does not examine letters of transmittal for accuracy and sends them to the tender agent for its examination,32 a tender agent located outside of New York faces a brief delay in determining whether the letters are in proper form and whether the corresponding securities will be delivered by book-entry or directly.33 Another commenter34 suggested that similar delays and balancing problems may occur when a tender agent, located outside of New York, attempts to reconcile tendering participant's letters of transmittal and delivery instructions with the number of shares DTC reports as delivered by book-entry.35

The Commission believes that DTC has developed responsible procedures to minimize these problems. As noted in the Proposing Release,36 on the day DTC receives letters of transmittal, it sends copies or originals of those letters to the tender agent for next day delivery. DTC also maintains daily and cumulative records of the number of shares successfully tendered and assists the tender agent in balancing mutual records each day. Moreover, in practice, the Commission believes that difficulties experienced using the VOP have been de minimis, while the benefits to tenderors and tender agents have been substantial.

In the Proposing Release, the Commission expressed its hope that if the advantages of DTC's VOP became better known and voluntary usage increased, a mandatory rule might be unnecessary. Although the Commission notes that voluntary use of DTC's VOP has increased significantly during the past several years,37 commenters generally concurred that universal voluntary participation, while likely, would take much too long.38 In addition, as outlined in the Proposing Release,39 and as confirmed by the commenters,40 processing tender offers outside of a book-entry environment has significant adverse effects on the nation's securities markets, the national clearance and settlement system,41 and the public. Accordingly, although the commenters were able to identify several reasons why DTC's VOP has not been used in the past, the majority of commenters, including the Stock Transfer Association, urged that the Commission adopt Rule 17Ad-14 promptly because of the significant benefits it would provide.

38 See Proposing Release, supra note 1, at n. 49.
39 In 1982, DTC processed only 53% of all eligible offers. Letter from William T. Denitzer, Chairman and Chief Executive Officer, DTC, to George A. Fitzsimmons, Secretary, SEC, June 1, 1983, at 2 (hereinafter "DTC Letter"). During the first quarter of 1983, bidders or their agents used DTC to process only 57% of the offers that could have been handled at DTC. Statement of Kenneth M. Scholl, Vice President, DTC, in DTC, in DTC, Newsletter, at 8 (June 1983).
40 See discussion accompanying notes 19-22 supra.
41 See Section 17A of the Act and Proposing Release, supra note 1, at 1700-45.
The Commission, therefore, believes it is appropriate to adopt Rule 17Ad-14. We believe that the benefits of book-entry processing of tender offers should be uniformly available as soon as possible to the transferee industry and the public. We hope that adoption of the rule will encourage other registered depositaries to develop and file programs similar to DTC’s VOP, which will further reduce the need for multiple physical deliveries. Accordingly, in light of the favorable comments received, the benefits of the VOP, which can be achieved nationwide, and the desire of market participants and securityholders to use VOP-type programs, the Commission believes that efficient processing can best occur during tender offers when the availability of securities depositaries is assured.

III. Discussion of Rule 17Ad-14

A. Tender Offers to Which Rule 17Ad-14 Should Apply

The Proposing Release asked for comment on whether depository availability should be mandatory for only certain tender offers.4 While some commenters, including representatives of the transfer agent community, believed that the proposed limitations in paragraph (b) on the scope of Rule 17Ad-14 were appropriate, other commenters favored expanding the number of tender offers that could be handled by the VOP. Only a few commenters recommended expanding the exclusions to reduce the number of tender offers for which tender agents would have to establish depository accounts.

1. Number of Securityholders and Shares Outstanding of Subject Company

As proposed, Rule 17Ad-14 would not apply to a subject company having fewer than 500 securityholders of record of the class of securities sought by the bidder and fewer than 500,000 shares of that class outstanding. Section 14(d)(1) of the Act, one of the central provisions of the Act governing tender offers, is most commonly triggered when a tender offer is made for a class of securities registered under Section 12 of the Act. Registration is required under Section 12(g)(1)(B) of the Act when, among other things, the issuer has a class of equity securities (other than exempt securities) held of record by 500 or more persons. Thus, like Section 14(d)(1) of the Act, paragraph (b)(1) of Rule 17Ad-14 uses the securityholder count contained in Section 12(g)(1)(B) as the threshold for determining when book-entry facilities must be available.

The requirement that the subject company have 500,000 shares of the target class outstanding was based on several considerations. First, the benefits of book-entry processing are needed most by issuers for large companies that have substantial shareholder bases and actively traded issues. Second, nearly all issuers whose securities attract appreciable trading activity warrant depository services, even though some of those issuers are relatively small. Moreover, most commenters favored including under Rule 17Ad-14 as many tender offers as possible, so that book-entry efficiencies in depository-eligible securities would be available on a routine basis.

Accordingly, the Commission believes that the size criteria contained in Rule 17Ad-14(b)(1), which will reach tender offers for nearly all depository-eligible securities, are appropriate.

2. Odd Lot Tender Offers

Several commenters discussed the proposed exclusion in paragraph (b)(2) for odd-lot tender offers (i.e., tender offers to persons holding fewer than 100 shares). Some commenters, believing that Rule 17Ad-14 should apply to tender offers for odd-lots of the subject company’s securities, stated that securityholders whose odd-lots are held by banks, brokers, or other intermediaries should be able to take advantage of book-entry delivery and should not have to endure the delays and risks of missing an offer while waiting for their securities to be reissued in their names. Other commenters, however, including representatives of the transfer agent community, noted the limited secondary trading market effects during odd-lot offers and argued that those limited effects justified the exclusion of odd-lot offers. Specifically, when an odd-lot tender offer occurs, there usually is very little, if any, impact on the market price of securities trading in round-lots. Indeed, the price of securities trading in odd-lots is derivatively priced from the round-lots. For those reasons, in part, DTC indicated that it generally will not make a security ineligible for depository services simply because it is subject to an odd-lot tender offer. Thus, to the extent that one of the underlying objectives of Rule 17Ad-14 is to reduce adverse effects on the secondary trading markets and on the processing of secondary market transactions during tender offers, those concerns normally are not present in odd-lot tender offers.

Accordingly, while the Commission encourages bidders and their agents to use VOP-type programs for odd-lot tender offers when cost effective and efficient to do so, the Commission has determined not to include odd-lot tender offers within the scope of Rule 17Ad-14 at this time.

44 Many retail customers owning odd-lots leave those securities with their broker-dealer or bank. Many other odd-lot positions, however, are held outside securities depositaries. See generally Proposing Release, supra note 1, at nn. 16 & 23.

45 The Commission recently amended Rules 13e-3 and 13e-4 to exclude odd-lot tender offers [17 CFR 240.13e-3 and 13e-4]. Exclusion of odd-lot tender offers from Rule 17Ad-14, therefore, is consistent with the Commission’s treatment of odd-lot tender offers under other rules.
B. Number of Depository Accounts

Another question posed in the Proposing Release was whether Rule 17Ad-14 should require the bidder's agent to establish and maintain an account with one or more, rather than all, qualified securities depositories. Many commenters who addressed this issue suggested that the rule would best promote safety and efficiency if accounts were required at all depositories, including regional depositories.

Certain commenters, however, including some transfer agents, recommended that a tender agent be required to establish an account with only one securities depository. These commenters noted that establishing an account at only one securities depository could simplify several of the tender agent's tasks, such as balancing depository accounts, since it would not have to deal with several depositories. Many of these commenters also suggested, however, that all depositories should be required to keep the subject company's securities eligible for depository services and that those depositories not under contract with the tender agent should be required to operate interfaces or links with the primary depository ("interfaced system").

The Commission has monitored the operation of depository and clearing corporation interfaces for several years and believes that, under most circumstances, interfaces effectively link components of the national clearance and settlement system. Nonetheless, the Commission believes that depository interfaces may not be particularly well-suited to the demands of tender agents and depositary participants during a tender offer. During a tender offer, a depository needs to control its participants' securities positions and certificates closely to assure that it can satisfy its participants' instructions efficiently and fairly. Requiring depositories to use interfaces to tender securities imposes an intermediary step in the process, which can create substantial liabilities for the participants, tender agents and all linked depositories. At the same time, universal dependence on interfaces could increase the risk to tenderers and bidders that securities committed by letters of transmittal will not be physically delivered on a timely basis due to fails at an interfacing depository. At the very least, in any instance in which a tender agent depends on depository interfaces, the agent will experience reduced control over interfaced depositories, and remote participants may face early cut-off times. While we recognize the difficulties associated with establishing accounts with each of the four qualified securities depositories, the Commission believes that these difficulties for tender agents are substantially outweighed by the potential for reduced control and financial exposure that could result from universal dependence on an interfaced system. Accordingly, the Commission believes that Rule 17Ad-14 should require tender agents to establish accounts at all qualified securities depositories.

In addition, one commenter noted that Rule 17Ad-14 may require several registered transfer agents, each acting on behalf of a single bidder, to establish redundant accounts with qualified securities depositories. For example, if a bidder appointed one registered transfer agent as the depository and another registered transfer agent in a different city as a forwarding agent, both would be required under paragraph (a) of Proposed Rule 17Ad-14 to establish depository accounts. Since the securities depository could then make book-entry deliveries of securities to either transfer agent, the commenter suggested that establishing two separate accounts is unnecessary and potentially confusing.

The Commission agrees with this suggestion. The Commission believes that only one registered transfer agent, acting on behalf of the bidder, need establish an account with a qualified depository to permit book-entry tender and withdrawal of securities. That agent should be the one receiving tendered securities and making payments therefor. Those responsibilities will usually be borne by the depository, in the case of a tender offer, and the exchange agent, in the case of an exchange offer. The Commission believes that duplicative accounts will afford any additional benefits to the financial community or the public. Accordingly, paragraph (a) of Rule 17Ad-14 has been modified to address this concern.

C. Continued Eligibility of the Subject Company's Securities

The Proposing Release asked for comments on whether a qualified securities depository should be permitted, under any circumstances, to declare the subject company's securities ineligible for depository services after the bidder (or its agent) has established a depository account for receiving tendered securities. Many commenters, including DTC, stated that once the depository and the tender agent reach agreement to establish an account, a securities depository should not be able to make the subject company's securities ineligible for depository services.

Securities depositories filing proposals for qualified programs, pursuant to Section 19 of the Act, should specify the times and circumstances under which the depository would declare the subject company's securities ineligible for depository services. In that regard, the Commission expects that securities depositories will not exit securities from their systems absent very compelling reasons.
D. Withdrawal by Book-Entry

Rule 17Ad-14, as proposed, addressed only book-entry delivery and receipt of securities. In the interest of providing a complete tender offer service, however, DTC's VOP permits tender agents to return previously tendered securities, provided an appropriate withdrawal request is submitted to the tender agent within the permitted time period.57 In addition, several commenters indicated that return of securities by book-entry in response to a demand for withdrawal during competing bids is substantially easier and more efficient than physical certificate processing ex-depository. Since commenters and the Commission believe that the benefits or book-entry processing should be available in connection with tender offers to the greatest extent possible, Rule 17Ad-14 has been changed to include the process of returning previously tendered securities that have been withdrawn.

E. Tendering Physical Certificates Directly to the Bidder's Agent

Some commenters pointed out that there may be situations in which it is necessary to deliver physical certificates directly to the bidder's agent outside of the securities depository. For example, it may be quicker to deliver directly pursuant to a guarantee as the end of the protection period approaches.58 As a result, the Commission emphasizes that the rule does not prevent a participant from tendering physical certificates to the tender agent outside of the book-entry environment, and a tender agent is not prohibited from accepting securities so tendered.59 Indeed, under Rule 17Ad-14, a depository participant may choose the method of tendering most appropriate to its needs.

IV. Related Matters Raised by Comments

The Proposing Release and the commenters’ responses raised a variety of other issues related to tender offer processing and the national clearance and settlement system. None of these concerns, to the extent they bear significantly on tender offer processing, are discussed below.60 For example, some commenters believe that the Commission could foster greater use of automated clearance and settlement systems by requiring greater uniformity of procedures among all clearing agencies. Specific suggestions included: (i) requiring clearing corporations to establish uniform buy-in and liability notice rules; 61 and (ii) requiring all securities depositories to have the same eligibility criteria for securities. Under current practice, the Commission understands that securities depositories customarily grant eligibility to a security upon a participant’s request even if that security is traded infrequently. Therefore, the Commission believes that differences in depository-eligibility lists for equity securities do not raise a serious concern at this time.62 The Commission agrees that the present differences in buy-in and letter of liability procedures substantially impair the efficiency of, and increase the risks for, the safe clearance and settlement of securities transactions during tender offers. The Commission understands, however, that the clearing agencies are actively resolving these disparities in cooperation with Commission staff members.63

Several commenters believed that all tender offers should require a “protection period”64 and suggested that the Commission adopt a rule—for example, under Section 14(e) of the Act—establishing a minimum protective period.65 While the Commission appreciates that a protection period reduces processing difficulties,66 the Commission does not believe that at this time it should establish by rule a standard protection period. Industry custom provides an eight day protection period for almost all offers. While a rule requiring a minimum protective period may be necessary at some point if custom changes, we are not persuaded that a regulatory requirement is needed now.67

The Commission similarly believes that other matters raised by commenters involve business considerations to be resolved among the bidder, its agent, and the securities depository prior to processing the tender offer.68 Accordingly, while the Commission will monitor the use of VOP programs during tender offers to determine whether these concerns warrant further attention or amendments to rules and procedures of the securities depositories, the Commission does not believe it is appropriate at this time to address these concerns in Rule 17Ad-14.69

\[\text{References}\]

\[59\] The Commission notes this result comports with the recommendation of the Advisory Committee. See note 17 supra and accompanying text.

\[67\] For example, commenters suggested certain tender offer securities processing enhancements, including: (i) Synchronizing the VOP “cut-off time” (i.e., the time by which depository participants must instruct, for example, DTC to deliver securities to the tender agent by book-entry) with the expiration dates in each tender offer; (ii) requiring DTC to adjust its VOP system in each offer to tender agent’s procedures; (iii) expanding the Fast Automated Securities Transfer program (see Proposing Release, supra note 1, at 17610 and n. 58) to simplify delivery of odd-lot certificates to customers; and (iv) providing that book-entry tenders be accepted even if those tenders are submitted after the offer expires. See Proposing Release, supra note 1, at n. 47. In addition, although one commenter suggested that Rule 17Ad-14 should provide that book-entry delivery of tendered securities is legally equivalent to delivery of physical certificates, we note that state law already provides that securities may be transferred by book-entry delivery at a registered securities depository. See e.g., N.Y. U.C.C. section 8-320 (McKinney, Supp. July 1983); Cal. Com. Code § 8320 (West Supp. 1988); III. Ann. Stat. ch. B: 28 section 8-320 (Smith-Hurd 1974): 13 Pa. Cons. Stat. Ann. section 8-320 (Purdun Supp. 1983).

\[68\] See also note 52 supra.

\[69\] See note 19 supra.
Furthermore, as indicated above, the Commission intends to monitor the effects of Rule 17Ad-14 generally and to modify the rule, as appropriate, to foster or accommodate further developments in tender offer processing and in the national clearance and settlement system.

V. Statutory Authority

Rule 17Ad-14 is being adopted pursuant to Section 2, 17A(a)(1)(B), 17A(d)(1), 17A(c)(3), 17C(a), 17A(d)(1), and 23(a) of the Securities Exchange Act of 1934 [15 U.S.C. 78a, 78k-1(a)(1)(B), 78m(d)(4), 78q(c)(3), 78m(c)(6), 78q-1(a), 78q-1(d)(1) and 78w(a)]. The Commission believes that Rule 17Ad-14 is necessary for the protection of investors and is consistent with the public interest.

Congress, in the Securities Acts Amendments of 1975, found, among other things, that the prompt and accurate clearance and settlement of securities transactions, including the transfer of record ownership, was necessary for the protection of investors and that inefficient clearance and settlement procedures imposed unnecessary costs on investors and persons facilitating transactions on behalf of investors. Congress also found that uniform standards and procedures for clearance and settlement would reduce those costs and increase protection for investors and persons facilitating transactions on behalf of investors. 19

As part of the Securities Acts Amendments of 1975, Congress also enacted Section 17A(d)(1) of the Act, which prohibits registered transfer agents and registered clearing agencies from engaging in any activity in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. In light of the need to further the purposes of Section 17A(a)(1) of the Act in the context of tender offers and the need for increased investor protection when processing transactions in securities of the subject company during tender offers, the Commission believes that it is appropriate to adopt Rule 17Ad-14.

In addition, the Commission believes that Rule 17Ad-14 will help maintain fair and orderly markets in the trading of the subject company's securities during a tender offer. Because clearance and settlement mechanisms will be less strained during a tender offer, market liquidity for those securities should be enhanced.

Finally, Section 14(d)(4) authorizes the Commission to prescribe rules regarding solicitations or recommendations to accept or reject a tender offer or requests or invitations for tenders. In soliciting tenders and acceptances of an offer, the bidder through its tender agent will need to provide for deposit and delivery of the subject company's securities at qualified registered securities depositories by establishing accounts with those depositories.

The Commission believes that the costs, if any, to bidders of complying with Rule 17Ad-14 will be minimal. Currently, bidders do not incur any DTC charges when using the voluntary offering program. Instead, costs for operating that program are allocated among DTC participants using these services. The Commission anticipates that depositories offering these programs will continue to assess tender offer service charges on participants on the basis of participant usage. 20 Moreover, the Commission believes that elimination of a substantial percentage of physical certificate tenders should actually reduce tender agent costs.

In addition, to simplify and expedite the granting of exemptions under paragraph (d) of Rule 17Ad-14, the Commission is amending its Rules Delegating Functions to Division Directors, Regional Administrators, and the Secretary of the Commission (17 CFR 200.30-1 et seq.) to delegate that function to the Director of the Division of Market Regulation, as provided below. The Commission is adopting this amendment pursuant to Pub. L. 87-592, 17 Stat. 394, 15 U.S.C. 78d-1, 78d-2.

List of Subjects

17 CFR Part 200
Administrative practice and procedure, Freedom of Information, Privacy, Securities.
17 CFR Part 240
Reporting and recordkeeping requirements, Securities.

VI. Text of Rule

In accordance with the foregoing, the Commission hereby amends Chapter II of Title 17 of the Code of Federal Regulations as follows:

PART 200—[AMENDED]

1. By adding paragraph [a](43) to §200.30-3 as follows:

§200.30-3 Delegation of Authority to Director of Division of Market Regulation.

(a) [ ] [ ]

(43) To grant or deny exemptions from Rule 17Ad-14 (§240.17Ad-14 of this chapter), pursuant to Rule 17Ad-14(d) (§240.17Ad-14(d) of this chapter). (Pub. L. 87-592, 76 Stat. 394. 15 U.S.C. 78d-1, 78d-2).

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

2. By adding §240.17Ad-14 to read as follows:

§240.17Ad-14 Tender agents.

(a) Establishing book-entry depository accounts. 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 tender agents to return to depositary participants by book-entry movement securities withdrawn from the offer.

(b) Exclusions. The rule shall not apply to tender or exchange offers (1) that are made for a class of securities of a subject company 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
discussed in detail in this release the Commission believes that Rule 17 Ad-14 (d) will reduce processing costs for the financial community and for the public (a) will tend to eliminate secondary market inefficiencies and (b) will apply equally to all registered securities dealers and registered transfer agents. Accordingly, the Commission believes that Rule 17 Ad-14 will facilitate the establishment of a national system for the prompt and accurate clearance and settlement of securities transactions pursuant to Section 1A(d) of the Act, and will not impose a burden on competition that is not necessary or appropriate to further the Act.

By the Commission

Dated January 19, 1984

George A. Fitzsimmons
Chairman

SUPPLEMENTARY INFORMATION:

I. Introduction

The Federal Energy Regulatory Commission (Commission) is amending its regulations for determining, for pricing purposes, the quantity of heat energy involved in a first sale of natural gas pursuant to the Natural Gas Policy Act of 1978 (NGPA). In so doing, the Commission is implementing the decision in Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission (INC V) in which the court vacated § 270.204 of the Commission's regulations.

The Commission is amending § 270.204(c) of its regulations to specify that the number of Btu's determined under the 'standard test conditions' set forth in § 270.204 (a) and (b) must be used for establishing the maximum lawful price for gas sold in a first sale. Briefly stated, this amendment establishes that the Btu content of gas sold in a first sale under the NGPA must be determined on the basis of the natural gas being saturated with water vapor at 80 degrees Fahrenheit at a pressure of 14.73 psia, regardless of the actual delivery conditions.

II. Background

The energy value of natural gas is expressed in terms of British thermal units (Btu's). Each Btu represents the amount of heat energy needed to raise the temperature of one pound of water one degree Fahrenheit.

Under the Natural Gas Act (NGA), the Commission established prices per thousand cubic feet (Mcf) for natural gas sold in the interstate market. The Commission permitted upward and downward adjustments to these rates to reflect the Btu content of the gas determined under certain standard test conditions. These adjustments were

DEPARTMENT OF ENERGY
Federal Energy Regulatory Commission
18 CFR Part 270

Interpretive Rule for Btu Measurement Standard Under the Natural Gas Policy Act of 1978

Issued January 19, 1984

AGENCY: Federal Energy Regulatory Commission

ACTION: Interpretive rule

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its Btu measurement regulations for gas sold under the Natural Gas Policy Act of 1978 (NGPA). These regulations are intended to implement the District of Columbia Circuit Court of Appeals decision in Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission. The Commission is amending its regulations in § 270.204 to require that the maximum lawful price for gas sold under the NGPA must be calculated based on the Btu content of gas measured under the standard test conditions defined by the Commission.

EFFECTIVE DATE: January 19, 1984


1611, 211 (Doc. 1980). The United States Court of Appeals for the District of Columbia Circuit issued its mandate in this case on December 18, 1981. On December 30, 1980, Chief Justice Burger directed the issuing of the mandate today. The Commission filed a petition for rehearing prior to argument, which was denied.

More specifically, the standard test conditions determine or impose a number of Btu's produced by the combustion of constant pressure of the amount of gas which would occupy a volume of one cubic foot at a temperature of 60 degrees Fahrenheit, with respect to the gas in question. It should be noted that the pressure of 14.73 psia is the pressure for the state of Washington, D.C. and the temperature of 60 degrees Fahrenheit is the temperature for the state of Washington, D.C.

The unit of measure is the British thermal unit (Btu). One Btu is defined as the amount of heat energy required to raise the temperature of one pound of water one degree Fahrenheit.