

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-48949; File No. S7-13-03]

RIN 3235-A187

Recordkeeping Requirements for Registered Transfer Agents

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Final rule.

SUMMARY: The Commission is amending its rule concerning recordkeeping requirements for registered transfer agents. The amendments will make clear that registered transfer agents may use electronic, microfilm, and microfiche media as a substitute for hard copy records, including cancelled stock certificates, for purposes of complying with the Commission's transfer agent recordkeeping rules and that a third party on behalf of a registered transfer agent may place into escrow the required software information.

EFFECTIVE DATE: January 28, 2004.

FOR FURTHER INFORMATION CONTACT: Jerry W. Carpenter, Assistant Director, or David Karasik, Special Counsel, at 202-942-4187, Office of Risk Management and Control, Division of Market Regulation, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549-1001.

I. Discussion of Amendments to Rule 17Ad-7(f)

A. Background

Rule 17Ad-6¹ sets forth the records that transfer agents must make and preserve and Rule 17Ad-7 describes how and for how long the required records must be maintained. On April 27, 2001, the Commission adopted amendments² to Rule 17Ad-7, that (1) allows registered transfer agents to use electronic storage media³ to maintain records that they are required by Rule 17Ad-6 to retain and (2) modified the requirements for using micrographic media⁴ as a method of record storage.

¹ 17 CFR 240.17Ad-6. All references to Rules 17Ad-6 and 17Ad-7 or to any paragraph of those rules will be to 17 CFR 240.17Ad-6 and 240.17Ad-7, respectively.

² Securities Exchange Act Release No. 44227 (Apr. 27, 2001), 66 FR 21648 (May 1, 2001) ("Adopting Release").

³ Under Rule 17Ad-7(f)(1)(ii), the term "electronic storage media" refers to any digital storage medium or system.

⁴ Under Rule 17Ad-7(f)(1)(i), the term "micrographic media" refers to microfilm or microfiche or any similar medium.

Specifically, Rule 17Ad-7(f) requires transfer agents that use electronic or micrographic media to store records to:

- Use electronic or micrographic storage mechanisms that are designed to ensure the accessibility, security, and integrity of the records, detect attempts to alter or remove the records, and provide means to recover altered, damaged, or lost records;
- Create an index of the records that are electronically or micrographically stored and store the index with the underlying records;
- Keep a duplicate of all records and indexes that are stored using electronic or micrographic storage media;
- Be able to promptly download electronically or micrographically stored records to an alternate medium such as paper, microfilm, or microfiche; and
- Keep in escrow an updated copy of the software or other information that is necessary to access and download electronically stored records.

Rule 17Ad-7 does not require transfer agents that wish to continue to maintain their records in hard copy format to maintain their records any differently from the way they stored them prior to the rule change. The purpose of those amendments was to increase the flexibility and efficiency of transfer agent recordkeeping while maintaining necessary controls over accuracy, integrity, and access to transfer agent records.

B. Discussion of Rule Amendments

Since the amendments to Rule 17Ad-7(f) were adopted in April 2001, we have learned that there is some uncertainty whether (1) Rule 17Ad-7(f) allows transfer agents to rely exclusively on electronic or micrographic records for purposes of the Commission's transfer agent recordkeeping rules and to no longer maintain hard copy records, including cancelled certificates and (2) a third party on behalf of the transfer agent may deposit with an independent escrow agent a copy of all the documentation required under Rule 17Ad-7(f)(5)(ii) for the purpose of complying with Rule 17Ad-7(f)(5)(ii).⁵ In order to eliminate this uncertainty, the Commission issued a release requesting comment on proposed

⁵ Under Rule 17Ad-7(f)(5)(ii), transfer agents that choose to use electronic storage media must, among other things, "place in escrow with an independent third party and keep current a copy of the physical and logical format of the electronic storage or micrographic media, the field format of all different information types written on the electronic storage media and source code and the appropriate documentation and information necessary to access records and indexes * * *

textual changes to Rule 17Ad-7(f) ("Proposing Release").⁶

We proposed to amend paragraph (f) of Rule 17Ad-7 to clarify that records, including cancelled securities certificates, stored electronically or micrographically in accordance with the provisions of Rule 17Ad-7 may serve as a substitute for hard copy records required to be maintained pursuant to Rule 17Ad-6. Accordingly, this "substitution" provision would allow, but not mandate, the destruction of hard copy records, including securities certificates, if electronic or micrographic records have been created in conformity with Rule 17Ad-7(f).⁷

In addition, we proposed to amend paragraph (f)(5)(ii) of Rule 17Ad-7 to clarify that a transfer agent may fulfill its software escrow obligation by having a third party deposit with an independent escrow agent a copy of all the documentation required under Rule 17Ad-7(f)(5)(ii) on behalf of the transfer agent.⁸ A transfer agent using a third party vendor to maintain its records would be allowed to have the third party vendor place in escrow a copy of the vendor's proprietary source code on behalf of the transfer agent using the vendor's services. This amendment also would allow a third party vendor maintaining the records of more than one transfer agent to place in escrow one copy of the vendor's proprietary source code for all the transfer agents for which it acts.⁹

II. Discussion of Comment Letters

We received three comment letters in response to the Proposing Release.¹⁰

⁶ Securities Exchange Act Release No. 48036 (June 16, 2003); 68 FR 36951 (June 20, 2003).

⁷ The Commission has proposed new Rule 17Ad-19 that would require transfer agents to establish and implement written procedures for the cancellation, storage, transportation, and destruction of securities certificates. Securities Exchange Act Release No. 43401 (Oct. 2, 2000); 65 FR 59766 (Oct. 6, 2000). In addition, while amended Rule 17Ad-7 will permit the destruction of paper records for purposes of our recordkeeping requirements, a transfer agent may have an obligation to preserve such paper records under other applicable law or rules.

⁸ One situation that calls for this clarifying amendment is when a software provider licenses its electronic records storage system software to a transfer agent but does not grant a license for the source code. In this case, the transfer agent does not have access to the source code.

⁹ Rule 17Ad-7(f)(5)(ii) requires the third party to file a written undertaking with the Commission stating that it agrees to furnish the Commission with the appropriate documentation and information necessary to access the records and indexes promptly upon request.

¹⁰ Letters from Jeffrey G. Rutowski, Vice President, Integrated Fund Services (June 30, 2003); Cathy Danahy, Assistant Director, Nebraska Secretary of State's Office, Records Management Division (July 14, 2003); and Charles V. Rossi, Division President, EquiServe, Inc. (July 29, 2003).