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February 24, 2014

Via Email: rule-comments@sec.gov

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Reponse to DTC Response Letter; Notice of Filing of Proposed Rule Change to specify procedures available to issuers of securities deposited at DTC for book entry services when DTC imposes or intends to impose restrictions on the further deposit and/or book entry transfer of those securities

File No. SR-DTC-2013-11

Dear Ms. Murphy:

This letter responds to The Depository Trust Corporation's ("DTC's") response (the "DTC Response"), dated February 10, 2014, to comments made to the proposed rule change concerning deposit chills and global locks (the "Proposed Rule"), including comments made by the undersigned dated January 14, 2014 (the "Comment Letter").

We believe DTC's Proposed Rule fails to meet the requirements of Section 17A of Securities and Exchange Act of 1934, as amended (the "Exchange Act"). DTC adopts overly narrow interpretations of its obligations to provide fair procedures in light of the nature of its status as self-regulatory organization. DTC seeks to establish and through SEC approval of its Proposed Rule maintain the status quo which we believe unfairly disenfranchises the smallest most vulnerable companies, fails to provide fair process and seeks to legitimize rules of practice which would give the outward appearance of compliance with the SEC's clear mandate to establish fair procedures for all companies, but fails on numerous grounds to do so.

More troubling, DTC seeks to establish a right to determine when an issuer should be punished (through disabling actions denying an issuer the right to electronic clearance and settlement services over which DTC maintains an exclusive monopoly and which services have been mandated by Congress) because its shareholders or it are suspected of having failed to comply with the securities laws, a function that has since 1934 been the exclusive province of the SEC. We question what authority DTC has to interpet complex matters of securities laws when neither Congress nor the Courts have given DTC such authority. At the core, DTC seeks to displace the well established enforcement responsibility of the SEC for securities law compliance and other regulatory bodies with practices that fail to meet basic standards of due process and can be and have been the death knell for numerous issuers.

While we question many of the claims made by DTC in the DTC Response,[1] we wish to focus our response on the DTC's refusal to include in the Proposed Rules a Rule 22 hearing or an internal appeals process that is meaningful. We believe the type of processes for review of SRO actions analogous to those at FINRA or NASDAQ reflect the type of processes mandated by the SEC in which impartial experts with experience in securities matters are asked to review staff determinations with guidance from SRO general counsel staff on the law and regulations. We believe DTC's proposal merely extends DTC's stranglehold over market participation and evidences further resistance of accountability to "***issuers***".

We believe that the ability to hold a substantive hearing before the DTC challenging a decision to impose a deposit chill or global lock is a fundamental due process right that an issuer is entitled to under Section 17A of the Exchange Act. Any reasonable reading of the Commission's opinion *In the Matter of International Power Group., Ltd, etc., For Review of Action Taken by Depository Trust Company, Admin Proc File No. 3013687* ("*International Power*")[2] would conclude that the Commission believed that *International Power* should have been accorded a Rule 22 hearing by the DTC. For example, the Commission made the following observations in *International Power:*[3]

> "DTC has not articulated an adequate rationale for providing a hearing to an issuer for whose securities DTC will provide no services, but not to an issuer whose securities are denied those clearance and settlement services that go to the heart of DTC's role as a clearing agency."

In the DTC Response, DTC argues that it is not required to provide a Rule 22 hearing because the Commission never directed it to do so in *International Power*. While it is true that the Commission never specified that the DTC is required to provide a Rule 22 hearing, the reason for this is because the Commission was opining on other issues, namely whether the Commission has jurisdiction to review DTC's suspension of services and whether International Power has standing. DTC therefore sets up a straw man in justifying its rejection of including Rule 22 hearing in the Proposed Rule and wrongly interprets the Commission's views in *International Power* as it relates to Rule 22.

Moreover, DTC claims that the Commission left the specifics of the fair procedures up to DTC. Again, while this is true, the DTC ignores that the Commission in *International Power* specifically referred the DTC, in its design of fair procedures, to pre-existing processes that provide an opportunity to be heard including FINRA Rule 9558 which specifically includes a right to a hearing under FINRA Rule 9559.[4]

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[1] The DTC Response Letter also failed to address the following comments in the Comment Letter: "DTC's legal opinion requirement is overly broad imposing disproportionate burdens on the issuer", and "The DTC Proposed Rule will disproportionately burden smaller issuers and in particular former shell companies".

[2] Available at www.sec.gov/litigation/opinions/2012/34-66611.pdf.

[3] *See* International Power at 9.

[4] *See* foonote 36 of International Power at 13.

This interpretation is further supported by dictum from the ATIG case[5] (a case cited by the DTC in support of its contention that it is not required to provide a Rule 22 hearing) in which the Commission summarized the *International Power* decision in the following terms:[6]

> In International Power Group…[t]he Commission further found that, in order to comply with its statutory obligation to provide fair procedures, DTC must provide notice of its determination to the issuer, specifying the basis for DTC's action, **and must also provide the issuer with an opportunity to be heard**. [emphasis added]

In arguing that DTC should ***not*** provide an internal appeals process, DTC attempts to distinguish itself from FINRA and NASDAQ, both of which have established internal appeals processes. Significantly, DTC claims that unlike FINRA and NASDAQ, it "does not perform a policing function to root out fraudulent and manipulative conduct in violation of the securities laws".

We find this statement at odds with other statements made by the DTC including the following statements made in the DTC's 19b-4 filing of the Proposed Rule with the Commission:

> "DTC maintains a robust system for monitoring its compliance with governing law including, without limitation, the AML requirements of the BSA, and OFAC sanctions.
>
> Where such monitoring raises concerns as to whether securities held at DTC have been distributed in violation of federal law including, without limitation, the requirements of Section 5 of the Securities Act, DTC may impose a Deposit Chill or Global Lock." (page 6 of 56)
>
> "Similarly, the Financial Industry Regulatory Authority, Inc. ("FINRA") has advised broker-dealers to be on alert for "red flags" of possible illegal distribution of unregistered securities. Although DTC is not subject to FINRA oversight, DTC has nonetheless taken account of FINRA's "red flags" in considering if Deposited Securities continue to comply with DTC's eligibility requirements." (page 6 of 56)

Clearly from the above, as the DTC itself admits, it is involved in a form of policing to root out illegal conduct in violation of the securities laws, not unlike FINRA and NASDAQ, although it clearly has not employed staff dedicated to such which is another area ripe for DTC abuse, and improper and inconsistent application of the law. It therefore seems that DTC wants to

[5] *In the Matter of the Application of Atlantis Internet Group Corp. ("ATIG").*

[6] *See* footnote 2 of ATIG at 2.

have its proverbial cake and eat it too by maintaining the power to impose deposit chills and global locks without having to subject itself to an internal hearing process and not having the trained and experienced personnel of the SEC, FINRA or NASDAQ.

In light of the above, we find it increasingly perplexing that the DTC refuses to provide the same type of rights that similar SROs provide to issuers. In the year 2014, its simply inconceivable that a quasi-governmental body that plays such a pivotal role in the US securities market and vested with such awesome power is not required to submit itself to an internal hearings process. We therefore call on the Commission to reject the DTC's Proposed Rule in its current form and the SEC should not permit DTC to extend the scope of its authority to determinations of what is or is not lawful activity under the Securities Act of 1933, as its behavior and Proposed Rules seek. Rather, the limit of DTC activities should be to appropriate and lawful behavior in the realm of the clearance and settlement of securities transactions. We urge the DTC to seek guidance from the legal and financial community prior to proposing new rules so that the views of affected market participants can be heard and incorporated in its idea of what would constitute fair process.

We appreciate the opportunity to respond to the DTC Response and respectfully request that the Commission and DTC consider our comments. We are available to meet and discuss these matters with the Commission, the DTC and their staff, and to respond to any questions.

Very truly yours,

/s/ Gary Emmanuel

Gary Emmanuel

/s/ Harvey Kesner

Harvey Kesner