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April 29, 2014

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

Re: **Response to Comments: Self-Regulatory Organizations; The Depository Trust Company; 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, as amended; Release No. 34-71745; File No. SR-DTC-2013-11**

Dear Ms. Murphy:

The Depository Trust Company ("DTC") submits this letter in response to comment letters submitted following the Securities and Exchange Commission's (the "Commission") order instituting proceedings ("OIP") with respect to the above-referenced rule change application filed pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"),[1] and Rule 19b-4 thereunder (the "Original Filing").[2]

On March 19, 2014, DTC filed two amendments to the Original Filing (the "Amended Filing," together with the Original Filing, the "Filing").[3] The OIP, issued that same day, solicited further comments on or before April 15, 2014. Three additional comment letters were submitted: Louis A. Brilleman, Esq. ("Brilleman"), April 10, 2014

[1] 15 U.S.C. § 78s (b)(l), as amended.

[2] 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, Release No. 34-71132, File No. SR-DTC-2013-11 (Dec. 18, 2013).

[3] Notice of Filing Amendment Nos. 1 and 2 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a 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, Release No. 34-71745, File No. SR-DTC-2013-11 (Mar. 19, 2014).

(the "Brilleman Letter");[4] the Securities Transfer Association, Inc. ("STA"), April 15, 2014 (the "STA Letter );[5] and Optigenex Inc. ("Optigenex"), April 15, 2014 (the"Optigenex Letter").[6]

DTC appreciates this opportunity to respond to the final round of comment letters.

***Introduction: The Filing Provides Issuers With Fair Procedures***

At the outset, it is appropriate to highlight certain key points that have been developed during the rule approval process demonstrating that the proposed rules provide issuers with the fair procedures as required by Section 17A(b)(3)(H) of the Exchange Act, as interpreted by the Commission in its March 15, 2012 *IPWG* decision.[7]

- These fair procedures include:
    - notice to the issuer that a Deposit Chill or Global Lock has been or will be imposed;
    - an explanation to the issuer of the specific grounds upon which the restrictions are being or have been imposed;
    - the actions that the issuer must take in order to be heard and to object to the institution or maintenance of the restriction;
    - the process DTC will undertake to review written submissions of the issuer in objecting to the restriction and to render a final decision concerning the restriction; and
    - maintaining a complete record for submission to the Commission in the event an issuer appeals.
- Even though not mandated by Section 17A or the *IPWG* decision, DTC will apply these fair procedures to issuers whose securities were restricted before the *IPWG* decision who request such review.

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[4] Brilleman had previously submitted a comment letter concerning the Original Filing on January 14, 2014 (the "Original Brilleman Letter").

[5] The STA had also previously submitted a comment letter concerning the Original Filing on January 14, 2014 (the "Original STA Letter").

[6] Susanne Trimbath submitted a comment letter on March 19, 2014 (the "Trimbath Letter"). The Trimbath Letter does not make any substantive comments aside from joining in the comments set forth in the Original STA Letter, which DTC fully addressed in its previous response letter.

[7] *In the Matter of the Application of Int'l Power Group, Ltd. For Review of Action Taken by The Depository Trust Co.*, SEC Release No. 34-66611, 2012 SEC LEXIS 844 (Mar. 15, 2012).

- Beyond conclusory arguments, none of the commenters have set forth any applicable authority to support their argument that DTC must provide additional levels of review or testimonial hearings. To the contrary, DTC has demonstrated that the proposed procedures, including the hearing process, are consistent with the requirements of Section 17A.[8] Even by analogy to constitutional due process standards, DTC has demonstrated that testimonial hearings are not required.[9]

- Nor, as DTC has demonstrated, are the procedures utilized by NASDAQ and FINRA in carrying out statutorily mandated[10] regulatory and law enforcement functions applicable to DTC's activities as a registered clearing agency.[11]

DTC will now address briefly the largely repetitive arguments contained in the comment letters submitted following the issuance of the OIP.

### 1. *The STA Letter Raises No New Arguments, Misstates the ATIG Opinion and Continues to Misinterpret the IPWG Opinion*

#### (a)

Before responding briefly to the repetitive comments in the STA Letter, DTC is constrained to point out that the STA has misstated the Commission's recent order in *In The Matter of the Application of Atlantis Internet Group Corp* ("ATIG").[12]

The STA Letter states that in *ATIG* "the Commission remanded matters to DTC in order to DTC in order to further develop the record… ."[13] Not so; there was no remand in *ATIG*. Rather, the Commission denied the issuer's application for a stay and proceeded to issue a briefing schedule.[14] The matter has been fully briefed and is *sub judice* on the merits of the petition.

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[8] DTC's February 10, 2014 response (the "February Response") at 2-4.

[9] *Id.* at 4 n. 19.

[10] *See* Exchange Act, Section 6(b)(5), 15 U.S.C. § 78f(b)(5); Exchange Act, Section 15A(b)(6), 15 U.S.C. § 78o-3(b)(6).

[11] February Response at 5-7.

[12] *In the Matter of the Application of Atlantis Internet Group Corp.*, For Review of Disciplinary Action Taken by The Depository Trust Co., SEC Release No. 34-70620, Admin Proc. File No. 3-15432 (Oct. 7, 2013). In *ATIG*, a globally locked issuer sought a stay pending a decision on the merits of its claims that DTC had imposed a Global Lock in violation of Section 17A(b)(3)(H).

[13] STA Letter at 2.

[14] *See In the Matter of the Application of Atlantis Internet Group Corp.*, For Review of Action Taken by The Depository Trust Co., SEC Release No. 70706, Admin Proc. File No. 3-15432 (Oct. 17, 2013).

(b)

In rehashing its previous arguments, the STA principally argues that, after a determination has been made by DTC to impose a restriction on an issuer's securities, the issuer should be entitled to an internal DTC appeal and evidentiary hearing before an independent panel, akin to the procedures under DTC Rule 22, including independent (*i.e.*, non-DTC employee) panelists. In support of its argument, the STA relies on hearing procedures afforded by NASDAQ and FINRA to their member brokers.

As set forth more fully in the February Response at 4-8, the STA's suggestion that an internal appeal is necessary is without merit. To the extent that the STA purportedly is concerned with delays, costs, and efficiencies, the STA contradicts its own argument by requesting that an additional level of review be injected into the review process.

Nor is there any articulated justification for requiring DTC to hold testimonial hearings and, moreover, "outsource" this hearing responsibility, at least in part, to outside panelists, as the STA urges. Again, the focus of DTC's reviews in these matters is whether its eligibility standards for deposited securities have been satisfied and whether the Commission or other regulatory agency has taken action with respect to an issuer's securities.[15] Whether arising in the context of Deposit Chills or Global Locks, these reviews do not implicate the hotly contested factual disputes and allegations of illegal and fraudulent conduct that characterize the regulatory and disciplinary proceedings that the STA proposes as models for DTC. There is simply no basis to compare FINRA's and NASDAQ's adjudicatory procedures in carrying out their regulatory responsibilities with the fair procedures provided by DTC in reviewing compliance with its eligibility standards.

The only case cited by the STA, *SEC v. Sloan*,[16] is clearly distinguishable. In *Sloan*, the Commission issued a series of successive 10-day summary suspension orders pursuant to Section 12(k) of the Exchange Act.[17] The successive suspensions aggregated to over one year.[18] The Supreme Court found that this series of suspensions was beyond the scope of the Commission's statutory authority under Section 12(k), which provides that the Commission may summarily suspend trading in any security for a period not exceeding ten days without any notice or an opportunity to be heard.[19]

In the first instance, *Sloan* is readily distinguishable on its facts. The question there was whether the successive summary orders exceeded the Commission's limited

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[15] DTC's February Response at 7.

[16] *SEC v. Sloan*, 436 U.S. 103 (1978).

[17] Securities Exchange Act of 1934, 15 U.S.C. § 78l(k).

[18] *Sloan* at 106.

[19] *Id.* at 111-12.

statutory authority to suspend trading without notice or a hearing.[20] The Court ruled that they did.[21] Here, by stark contrast, there is no analogous question of statutory interpretation.

But more importantly, *Sloan* is, if anything, *consistent* with DTC's proposed new procedures for reviewing issuer objections to Deposit Chills and Global Locks. The Supreme Court in *Sloan* found that if the Commission were to impose trading suspensions beyond the 10-day limits of Section 12(k), the Commission would have to afford the affected issuer "*some sort* of notice and opportunity to be heard."[22] Nowhere did the Court find that *"some sort"* of notice and an opportunity to be heard required a testimonial hearing. Therefore, even if *Sloan* applied under the present circumstances (which it does not), DTC's proposed rules clearly provide issuers with procedural safeguards that constitute far more than "some sort" of notice and an opportunity to be heard.

Finally, the STA continues to misstate the *IPWG* opinion by citing FINRA Rule 9558 (Summary Proceedings for Actions Authorized by Section 15A(h)(3) of the Exchange Act) "as a relevant template for DTC's own procedures that would afford fair process."[23] As explained in the February Response at 11, the Commission only referenced FINRA Rule 9558 in the *IPWG* opinion as guidance concerning the notice process in connection with emergency actions taken by DTC with respect to an issuer's securities. The Commission did not cite FINRA Rule 9558 as a prototype for DTC to follow with respect to the imposition of *all* of Deposit Chills and Global Locks.

### 2. *The Optigenex Letter Improperly Uses the Comment Process to Challenge a Deposit Chill Imposed on its Securities*

Optigenex improperly seeks to use the comment period to challenge the Deposit Chill imposed on its securities, which has been the subject of extensive and ongoing fair procedures. The Optigenex Letter focuses on DTC's April 11, 2014 letter to Optigenex (the "April 2014 Letter"), which DTC sent to Optigenex in connection with Optigenex's challenge to the Deposit Chill imposed on its securities.[24] The Optigenex Letter only mentions the Filing in passing. Indeed, Optigenex actually apologizes to the Commission for the "unusual step" of addressing its reply to the April 2014 Letter to both DTC and the Commission.[25]

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[20] *Id.*

[21] *Sloan* at 111.

[22] *Id.* at 112.

[23] STA Letter at 3.

[24] Optigenex Letter at 1-2.

[25] *Id.* at 2.

To the extent that the Commission considers the Optigenex Letter to be an appropriate comment letter, DTC would point out that DTC imposed the Deposit Chill on Optigenex's securities pre-*IPWG*, but has provided Optigenex with the full scope of post-*IPWG* fair procedures. DTC's April 2014 Letter, and its accompanying exhibits, makes that abundantly clear. Both the fact and extent of fair procedures provided to Optigenex demonstrate that DTC has complied with the Commission's directives in its *IPWG* decision.

### 3. *The Proposed Rules Are Not Required to Govern Restrictions Imposed Prior to the IPWG Opinion*

The Brilleman Letter again argues that the proposed rules do not provide fair procedures for Deposit Chills imposed prior to the *IPWG* opinion.[26] As noted in DTC's February Response at 13, the *IPWG* decision required DTC to "adopt procedures that accord with the fairness requirements of Section 17A(b)(3)(H), which may be applied uniformly in any *future* such issuer cases."[27] Nevertheless, for securities that were restricted prior to the *IPWG* opinion, if the issuers have requested review, DTC has been following these procedures - as in the case of Optigenex (*see* Section 2 above) - and will continue to provide the same fair procedures as for securities that are subject to restrictions post-*IPWG*.[28]

* * *

In conclusion, DTC believes that the proposed new rules comport with the requirements of Section 17A and the Commission's rulings, and respectfully urges that the Amended Filing be approved.

Sincerely,

Isaac Montal

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[26] *See* Brilleman Letter at 1; Original Brilleman Letter at 1-2.

[27] *IPWG*, 2012 SEC LEXIS 844, at *32 (emphasis added).

[28] The Brilleman Letter also renews the request from the Original Brilleman Letter that a Deposit Chill, especially one imposed prior to IPWG, be lifted automatically after a certain period from the date of its imposition. As set forth in the February Response at 13, for chills imposed after the IPWG opinion, if the issuer declines to submit a legal opinion or is unable to respond to the notice satisfactorily, a Global Lock will be imposed and may subsequently be released after the applicable six month/one year waiting period in accordance with proposed Rule 22(B). For a restriction imposed pre-*IPWG*, DTC will offer those same procedures upon request by the issuer.