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Via email attachment to:

Ms. Elizabeth Murphy
Secretary
Securities and Exchange Commission
450 First Street NE
Wshington, D.C. 20549

Re: DTC SERVICE RESTRICTIONS ON CERTAIN BOOK-ENTRY SECURITIES—PROCEDURES FOR AFFECTEDISSUERS

File number: SR-DTC-2013-11

Dear Ms. Murphy:

I represent several affected issuers who have been victimized by DTCC'S failure to comply with its obligations under Section 17A of the Exchange Act. I therefore appreciate the opportunity to comment on DTCC's long overdue rule proposals. Unfortunately, the proposed rules fall far short of providing the protections that are mandated by the Section 17A of the Exchange Act. Furthermore, the proposals do not provide affected constituencies of the issuer with any means to redress the imposition of a restriction.

What DTCC fails to recognize is that by the time a restriction is imposed, the securities that gave rise to the restriction have already been disposed of by the depositing party. Thus, only innocent shareholders are directly affected by the imposition of a restriction. For the most part, these are downstream purchasers or investors who purchased the stock in the open market. It is these innocent

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shareholders who are most directly affected by the lack of liquidity. DTCC's rule proposals do not provide this affected constituency any avenue through which they can redress the imposition of the restriction. DTCC should acknowledge this constituency and provide them with a means to obtain relief from the restriction. Once these shareholders have held the securities for the 144 holding period, perhaps the relief could be afforded by treating their sale as a transaction not involving the issuer, underwriter or dealer under Rule 144.

I. The Proposed rules do not provide for adequate notice.

The proposed rules continue to provide that DTCC may impose a deposit chill without providing prior notice and an opportunity to be heard. Nothing in Section 17A authorizes DTCC to restrict an issuer's access to its facilities without prior notice. Indeed the only section that comes close is the provision that deals with Summary suspensions:

> **(C)** A registered clearing agency may summarily suspend and close the accounts of a participant who (i) has been and is expelled or suspended from any self-regulatory organization, (ii) is in default of any delivery of funds or securities to the clearing agency, or (iii) is in such financial or operating difficulty that the clearing agency determines and so notifies the appropriate regulatory agency for such participant that such suspension and closing of accounts are necessary for the protection of the clearing agency, its participants, creditors, or investors. A participant so summarily suspended shall be promptly afforded an opportunity for a hearing by the clearing agency in accordance with the provisions of subparagraph (A) of this paragraph. The appropriate regulatory agency for such participant, by order, may stay any such summary suspension on its own motion or upon application by any person aggrieved thereby, if such appropriate regulatory agency determines summarily or after notice and opportunity for hearing (which hearing may consist solely of the submission of affidavits or presentation of oral arguments) that such stay is consistent with the public interest and protection of investors.

15 USCA § 78q-1 [West].

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By its own terms, however, this section cannot apply to issuers. First, this section only applies to participants in the clearing agency. Thus, DTCC can only suspend broker- dealer participants. Second, issuers are generally not subject to regulation by an "appropriate regulatory agency." Presumably, the Securities and Exchange Commission would be the agency that would regulate the issuer – assuming that the issuer has a class of security registered under either the Securities Act of 1933 or the Securities Exchange Act of 1934. This leaves issuers that trade on OTC markets pink sheets without an appropriate regulatory agency.

Second, the proposed rules do not provide for contemporaneous notice to both the issuer and the Commission. It is this contemporaneous notice that triggers the ability of the issuer to seek a stay of the restriction. This notice also requires DTCC to articulate the danger to the clearing agency. The proposed rules do not require DTCC to articulate the dangers it faces. All the proposals require is that DTCC provide notice of the restriction and the reasons for the restriction. If DTCC wants to impose a chill prior to notice it must be required to clearly articulate the risks that it believes it is exposed to if the chill is not imposed.

Historically, when DTCC has not been able to deliver its notice of a chill to an issuer, it chose to deliver the notice to the issuer's transfer agent. This form of substituted service is not reasonably calculated to provide notice to the issuer. DTCC should consider service upon the registered agent for service of process or the Secretary of State in the State of Incorporation.

II. THE PROPOSED RULES DO NOt PROVIDE ANY GUIDANCE AS TO WHAT IMMINENT HARM WILL JUSTIFY THE IMPOSITION OF A CHILL OR A LOCK BEFORE PROVIDING NOTICE TO THE ISSUER.

DTCC's proposed rules allows it to impose a restriction to protect itself and the public from imminent harm. The rule proposal does not provide any guidance as to the level of threat that would justify the imposition of a chill or lock prior to providing the issuer with notice. Historically, DTCC imposed chills and locks based upon allegations that third party investors violated Section 5 by illegally purchasing shares under rule 504 and then immediately reselling those shares in the open market. DTCC never articulated how it could be harmed by continuing to allow transactions in the issuer's securities to occur. DTCC should be required to clearly outline the minimum showing of imminent harm that would be needed to justify the imposition of a restriction prior to providing the issuer with notice. Ideally, if DTCC wishes to summarily a restriction on the securities of an

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issuer, it should develop procedures for an expedited proceeding. Those procedures should mirror FINRA'S rules governing Notices of suspension contained in rule 9552 of FINRA's Code of Procedure. There is no reason why DTCC cannot adapt Rule 9552 to cover imposition of restrictions on issuers. In sum, I urge DTCC to give careful consideration to including a version of rule 9552 in its Rule 19b-4 filing.

III. DTCC MUST PROVIDE ISSUERS WITH A FORUM IN WHICH TO DEFEND THEMSELVES AGAINST ALLEGATIONS THAT THEIR SECURITIES WERE DISTRIBUTED IN VIOLATION OF SECTION 5 OF THE SECURITIES ACT OF 1933.

DTCC insists that it can impose restrictions whenever a regulator alleges that an investor in a company was engaged in an illegal distribution. DTCC latches on to these allegations and imposes restrictions on issuers before those allegations are proven. DTCC proposed rules makes it clear that DTCC has no interest in providing issuers with a venue in which the issuer can challenge allegations of a Section 5 violation. Thus, DTCC makes it clear that while it will give lip service to requirements of due process, it has no intentions of providing issuers with a meaningful opportunity to be heard.

The Supreme Court has held that "[a] fundamental requirement of due process is 'the opportunity to be heard.' G*rannis v. Ordean*, 234 U.S. 385, 394,(1914). It is an opportunity which must be granted at a meaningful time and in a meaningful manner.*Armstrong v Manzo*, 380 US 545, 552, (1965). The Court also recognizedAn elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278, 132 A.L.R. 1357; *Grannis v. Ordean*, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363; *Priest v. Board of Trustees of Town of Las Vegas*, 232 U.S. 604, 34 S.Ct. 443, 58 L.Ed. 751; *Roller v. Holly*, 176 U.S. 398, 20 S.Ct. 410, 44 L.Ed. 520. The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean, supra*, and it must afford a reasonable time for those interested to make their appearance, *Roller v. Holly, supra*, and *cf. Goodrich v. Ferris*, 214 U.S. 71, 29 S.Ct. 580, 53 L.Ed. 914. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied. 'The criterion is not the possibility of

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conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.'

Mullane v Cent. Hanover Bank & Trust Co., 339 US 306, 314-15 (1950). Thus, if DTCC wants to use the pendency of regulatory proceedings against third parties to justify the imposition of a restriction on the securities of an issuer they must afford the issuer an opportunity to present its objections to the allegations that form the justification for the restriction. In the appropriate case, this would include allowing the issuer to litigate the issues raised in the regulatory proceeding. Due process requires nothing less.

I appreciate the opportunity to submit these comments to assist DTCC in fulfilling its obligations under Section 17A of the Exchange Act and the *International Power Group* decision. In the *International Power Group* decision, the Commission rejected the notion that informal procedures such as negotiating opinion letters satisfied Section 17A's requirement that DTCC provide issuers with fair procedures to address service restrictions. Specifically, the Commission held that DTC did not provide IPWG with adequate fair procedure(s) in connection with the suspension. *International Power Group, Ltd*, Exchange Act 34-66611. 2012 WL 892229, 8(SEC, March 15, 2012). Should you have any questions or wish to discuss these comments further, please do not hesitate to contact me.

Respectfully submitted,

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s/Simon Kogan

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