January 14, 2014

Via Email: rule-comments@sec.gov

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

Re: 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:

Sichenzia Ross Friedman Ference LLP is a corporate securities law firm with offices in New York City. We represent primarily smaller issuers engaging in corporate finance transactions and in periodic reporting obligations under the rules and regulations of the Securities and Exchange Commission (the "Commission"). Over the years, we have served as securities counsel to hundreds of public reporting companies and in the course of our representation, we have acted, from time to time, as securities counsel for companies that have been subject to deposit chills or global locks (common known as "DTC chills"). We believe that our first hand knowledge of the consequences of DTC chills on companies we have represented, which clients are often companies least able to react to unfounded regulatory action, places us in a unique position to comment on the DTC's proposed rule 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 (the "DTC Proposed Rule").

As noted by the Commission, the DTC plays a critical role in the national securities markets. In today's world of electronic trading, full DTC elegibility is a necessary part of being public, the absence of which has far-reaching consesquences. The most immediate effect of a DTC chill is on retail investors who, as a practical matter, are unable to deposit or trade in a company's securities due to impostion of restrictions on deposit of physical certificates or broker reluctance to process trades or DWAC transfers – placing the impact of a chill directly on those innocent persons who have risked their capital rather than on the issuer. This effect hurts, not helps, the capital markets.

For the issuer, virtually any capital raising transaction is placed in jeopardy by a chill. A regular requirement of any investment banking financing is DTC eligibility before any underwritten or placement agent financing can proceed. These broker-dealers

are loathe to introduce their clients if there is a prospect of limited trading volume, deposit impediments and stigma associated with being subject to a DTC chill. This leaves small and vulnerable issuers at the mercy of the most aggressive of the finance participants, purveyors of equity lines and toxic instruments, and requiring deep discounts for any capital raising opportunity. Again, this hurts, not helps, small companies and capital formation and is at odds with the intent and purposes of a national system for electronic clearance and settlement of trades, as mandated by Congress. In some cases, DTC chills themselves trigger events of default or breaches of negative covenants in company corporate financing agreements, potentially leading to a host of adverse consequences for the company. The cost of removing a DTC chill, if it can even be removed, can be substantial including legal fees, transfer agent fees and not to mention the diversion of the time and attention of management from the running of its business. Simply put, for many companies the imposition of a chill by the DTC is a draconian remedy that marks the beginning of the end for the affected company. As a gatekeeper to the securities markets, DTC bears awesome responsibility towards companies that are subjected to DTC chills as well as their affected shareholder base.

In the past, DTC chills were imposed without any advance notice or for that matter any notice at all to the affected company. Affected companies were left in the dark as to why the DTC imposed a chill in the first place and oftentimes the DTC would refuse to communicate with the company directly on the pretext that the issuer is not a DTC "participant" compounding the far-reaching consequences of the DTC chill described above. The opinion and order of the Commission *In the Matter of International Power Group., Ltd, etc., For Review of Action Taken by Depository Trust Company, Admin Proc File No. 3-13687* ("*International Power*")[1] changed all this as the DTC re-evaluated its treatment of issuers affected by DTC chills and worked towards implementing fair procedures.

It is upon the backdrop of this that we commend the DTC for taking the long overdue step in proposing rules that are intended to provide fair procedures when imposing deposit chills or global locks. However, we respectfully submit that the DTC Proposed Rule fails to comply with the statutory requirement to provide fair procedures under Section 17A(b)(5)(H) of the Securities and Exchange Act of 1934, as amended (the "Exchange Act") with respect to the prohibition or limitation by the clearing agency of any person with respect to access to services offered by the clearing agency.

We offer the following comments to the DTC Proposed Rule together with recommendations for amending the DTC Proposed Rule with a view to bringing the DTC Proposed Rule into compliance with Section 17A(b)(5)(H) of the Exchange Act.

The DTC Proposed Rule does not provide an issuer with the right to a hearing before the DTC in the case of a deposit chill or global lock.

In the *International Power* case, International Power requested DTC provide it with a hearing under DTC Rule 22 as an "Interested Person". DTC denied that request on

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

the basis that although the International Power common stock was subject to a DTC chill, International Power's common stock remained an "Elegible Security" and therefore was not entitled to a Rule 22 hearing.

A right to a hearing before the DTC is fundamental to providing affected companies with proper due process rights and therefore we believe that a company subject to either a deposit chill or global lock be accorded a right to a hearing before the DTC in accordance with Section 2 of DTC Rule 22.

Accordingly, we respectfully propose that the DTC amend the DTC Proposed Rule to state that companies subject to a deposit chill or global lock are considered an "Interested Person" for the purpose of DTC Rule 22.

The DTC Proposed Rule does not provide fair procedures for all types of deposit chills and global locks.

The procedures outlined in Proposed Rule 22(A) only apply in a situation where DTC detects unusually large volumes of deposits of a low priced or thinly traded "Eligible Security" and as a result restricts additional deposits.[2] Similarly, the procedures outlined in Proposed Rule 22(B) only apply in a situation where DTC determines to restrict book-entry services where it becomes aware of certain types of judicial or administrative proceedings or where a global lock is imposed as a result of of an issuer's failure to satisfy the requirements for lifting a deposit chill under Proposed Rule 22(A).[3]

Oddly, Proposed Rule 22(A) and Proposed Rule 22(B) do not apply to any other scenario in which the DTC restricts additional deposits or book-entry services, the implication being that an issuer would not be subject to the fair procedures that are purported to be afforded by Proposed Rule 22(A) or Proposed Rule 22(B) if the reason for the restriction does not fall into the narrowly prescribed situations described in the DTC Proposed Rule. If the DTC has a right to restrict additional deposits or book-entry services in any circumstance (subject to compliance with Section 17A of the Exchange Act),[4] it is not clear why Proposed Rule 22(A) and Proposed Rule 22(B) would not apply to any circumstance in which DTC imposes a deposit chill or global lock.

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[2] Section 1 of Proposed Rule 22(A) states that "[t]his Rule shall provide the fair procedures available to issuers of Eligible Securities where the Corporation detects unusually large volumes of deposits of a low priced or thinly traded Eligible Security and, as a result, determines to restrict additional deposits of the Eligible Security (a "Deposit Chill")."

[3] Section 1 of Proposed Rule 22(B) states that "[t]his Rule shall provide the fair procedures available to issuers of Eligible Securities where the Corporation determines to restrict book-entry services with respect to an Eligible Security (a "Global Lock"), where the Corporation: (a) Becomes aware that the SEC or other federal or state law enforcement or regulatory authority has commenced a judicial action or administrative proceeding (a "Proceeding") alleging that that a defendant or defendants therein (or other subjects of the action, collectively "Defendants"), sold Eligible Securities into the marketplace in violation of Section 5 of the Securities Act or applicable law and the Corporation reasonably determines that Securities subject to such allegations have been deposited at the Corporation; or (b) A Global Lock has been imposed as a result of an Issuer's failure to satisfy the requirements for lifting a Deposit Chill as set forth in Rule 22(A), Section 2(C)(ii) and (iii)."

[4] The broadly drafted savings clause in Section 3(b) of Proposed Rule 22(A) and Section 5(b) of Proposed Rule 22(B) seems to indicate that the DTC has such a right.

Accordingly, we respectfully propose that the procedures in Proposed Rule 22(A) and Proposed Rule 22(B) apply to any type of deposit chill or global lock, regardless of the reason for the imposition.

DTC's right to impose a deposit chill and global lock at any time is overly broad.

The DTC Proposed Rule empowers the DTC to impose a deposit chill and global lock without providing advance notice "in order to prevent imminent harm, injury or other such consequences to the Corporation or its Participants, or where the Corporation otherwise reasonably determines that such action is necessary to protect the prompt and accurate clearance and settlement of securities transactions through the Corporation."[5] Similarly, the savings clause of Section 3(b)(i) of Proposed Rule 22(A) and Section 5(b)(i) of Proposed Rule 22(B) reserves DTC's right to impose a deposit chill and global lock at any time after notice has been provided in the same circumstances as described above.

In its proposed form, emergency action may therefore be taken by the DTC *at any time* not only when faced with imminent harm or injury (as contemplated by the *International Power* decision) but in any conceivable situation that the DTC perceives some form of consequence to itself, a participant or the securities clearance system. Such broad power to take emergency action at any time is ripe for abuse and has the potential to render the advance notice procedure meaningless.

Moreover, it is not clear what constitutes "imminent harm or injury" and why co-mingling of non-freely tradeable securities in the DTC fungible bulk constitutes an "imminent harm or injury" [6] without regard to any quantititative or qualitative standards.

Accordingly, we respectfully propose that any emergency action taken by DTC be taken only when it is faced with "imminent harm or injury" and that DTC clearly define what "imminent harm or injury" means.

The time periods for automatic release of a global lock in the case of an enforcement proceeding are the functional equivalent of an indefinite global lock.

Section 3 of Proposed Rule 22(B) provides that a global lock imposed as a result of an enforcement proceeding will be automatically released after six months or one year, depending on the type of issuer, after the entry of a judicial order or judgment or final order in the case of an administrative proceeding brought by the SEC disposing of the claims against those defendants allegedly responsible for the violations of Section 5 of the Securities Act of 1933, as amended (the "Securities Act").

While this in theory may provide a means for resolution of a global lock through the passage of time, as a practical matter enforcement proceedings can drag on for years, at the conclusion of which the six month or one year clock only then begins to run. Given

[5] *See* Section 2 of Proposed Rule 22(A) and Proposed Rule 22(B).

[6] *See* Section E(1)(ii) of Rule Filing SR-DTC-2013-11.

the far-reaching consequences of being subject to a global lock, it would be a near miracle if a public company in need of working capital were able to survive through years of being subject to a global lock.[7] Moreover, in many instances these enforcement proceedings may involve parties where the issuer is not even the named defendant leaving an issuer without any ability to control or influence the outcome.

DTC purports to adopt the six month and one year time frames by analogy to the six-month and one-year holding periods in Rule 144 while at the same time adopting an arbritary commencement date that bears no relationship to the Rule 144 analogy.

Accordingly, we respectfully propose that the six-month and one-year time periods for global locks in the case of enforcement proceedings should commence upon the imposition of the global lock, regardless of outcome of the enforcement proceedings. We believe that if at the end of the applicable six month or one-year time period, an enforcement proceeding is still ongoing it is the role of the Commission to take action to suspend any further trading in the company's securities if it believes that such action is warranted.

DTC's legal opinion requirement is overly broad imposing disproportionate burdens on the issuer.

Section 2(b) of Proposed Rule 22(A) provides that the response to the deposit chill shall include a legal opinion from independent securities counsel reasonably acceptable to the DTC and that the deposit chill notice shall include a template legal opinion for guidance. Section 2(b) further provides that the purpose of the legal opinion is to establish that the "Eligible Security" satisfies DTC's eligibility requirements as set forth in Rule 5 and Section 1 of the DTC's Operational Arrangements, including but not limited to establishing that issuances of the Eligible Security deposited at the DTC were either (i) not restricted securities under Rule 144(a)(3), or (ii) were exempt from any restrictions on transferability under the Securities Act.

We are familiar with DTC's template opinion used for deposit chills and are concerned that Proposed Rule 22(A) gives the DTC the authority to require a legal opinion covering any issuer security deposited with DTC *at any time* rather than isolating the legal opinion to issuer securities deposited over a specific time frame that are the subject of concern.[8] For companies that have long histories of DTC securities deposits, the time and cost of conducting due diligence to support a legal opinion covering many months or even years of securities deposits places an unfair and disproportionate burden on issuers.

Accordingly, we respectfully propose that the scope of the legal opinion be limited solely to the securities deposited with the DTC that are the subject of its concern.

[7] After years of battling the DTC's imposition of a global lock, it is our understanding that *International Power*, the company that prompted DTC to finally propose fair procedure rules, is no longer in business.

[8] In one recent instance, DTC requested a "free-tradeability" legal opinion covering five years of DTC securities deposits.

The DTC Proposed Rule will disproportionately burden smaller issuers and in particular former shell companies.

DTC submits that it does not believe that the DTC Proposed Rule will have any impact on, or impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act, because the proposed procedures will apply to all issues that may be subject to deposit chill or global lock. However, while the DTC Proposed Rule purports to be applied uniformly, in our experience, it is smaller issuers that are disproportionately impacted by DTC chills and therefore it can be reasonably expected that smaller issuers will disproportionately bear the burden of rules that do not satisfy the fair procedure requirements of the Exchange Act. Moreover, Sections 3 and 4 of Proposed Rule 22(B) single out former shell companies for more adverse treatment without articlulating why a former shell company should be treated any differently from any other public company.[9]

Accordingly, we respectfully propose that Sections 3 and 4 of Proposed Rule 22(B) treat former shell companies in the same way as other public companies.

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Above all, DTC authority, if it has such, to impose draconian measures must be applied sparingly and with the benefit of due process protections. DTC's conclusion that anti-money laundering and other statutes empower it to become yet another regulatory gatekeeper should be carefully examined by the Commission. It is not at all clear to us that Congress intended DTC to play such an expansive role in the capital markets and Congress neither specifically authorized DTC to impose chills nor funded any such mandate.

We appreciate the opportunity to comment on the DTC Proposed Rule and respectfully request that the Commission and DTC consider our comments and recommendations. 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

[9] Sections 3 and 4 of Proposed Rule 22(B) require former shell companies to be in compliance with Rule 144(i) in order that a global lock can be released.