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February 10, 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; Release No. 34-71132; File No. SR-DTC-2013-11

Dear Ms. Murphy:

On December 5, 2013, The Depository Trust Company ("DTC") filed with the Securities and Exchange Commission (the "Commission") a proposed rule change 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 "Filing"). The Filing specified the proposed fair procedures DTC will provide to issuers of securities deposited at DTC for book entry services when DTC imposes or intends to impose certain restrictions on further deposit and/or book entry transfer of those securities.[2] On December 18, 2013, pursuant to Section 19(b)(1) of the Exchange Act, the Commission published notice of the Proposed Rule Change in the Federal Register.[3] During the subsequent comment period, a number of commentators submitted letters to the Commission in response to the Filing (collectively, the "Comment Letters").[4]

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

[2] Proposed Rules 22(A) and 22(B) are annexed as Exhibit 5 to the Filing and may be downloaded from the DTCC Web site, http://www.dtcc.com/legal/sec-rule-filings.aspx.

[3] *See* 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, Securities Exchange Act Release No. 71132 (December 18, 2013); 78 FR 77755 (Dec. 24, 2013). Citations in this letter to the Filing will be to the Notice of Filing published on the Commission's Web site, http://www.sec.gov/rules/sro/dtc/2013/34-71132.pdf.

[4] Comment Letters were submitted by (i) Suzanne H. Shatto ("Shatto") (December 20, 2013); (ii) DTCC Bigbake ("Bigbake") (December 27, 2013); (iii) Brenda Hamilton ("Hamilton") (January 8, 2014) (Bigbake and Hamilton are referred to collectively as the "Commenters"); (iv) Simon Kogan ("Kogan")

DTC has considered carefully the points made in the Comment Letters and appreciates this opportunity to respond.

1. ***Section 17A(b)(3)(H) of the Exchange Act Does Not Require a Testimonial or Oral Hearing When Issuers Challenge the Imposition of Restrictions on Services***

Sichenzia argues that pursuant to the Commission's opinion in *In the Matter of the Application of International Power Group, Ltd.* ("*IPWG*")[5] issuers subject to a Deposit Chill[6] or Global Lock have a right to a testimonial hearing pursuant to DTC's Rule 22 ("Rule 22").[7] This argument is based on an overly broad interpretation of the *IPWG* opinion, a misapplication of Rule 22, and is inconsistent with the governing provisions of Section 17A(b)(3)(H) of the Exchange Act.[8]

Section 17A(b)(3)(H) requires clearing corporations, such as DTC, to provide "persons" with "fair procedures" when restricting services.[9] Section 17A(b)(5)(B) requires that fair procedures include notice, the opportunity to be heard upon the specific grounds for denial or prohibition or limitation of services under consideration and the maintenance of a record.[10] Section 17A does not specify the nature of the fair procedures and does not require a clearing corporation to provide an affected person with a testimonial or oral hearing or review by a hearing panel.

In *IPWG* the Commission ruled that issuers are persons within the meaning of Section 17A(b)(3)(H) and ruled that DTC is obligated to provide issuers with fair procedures in connection with a Global Lock.[11] The Commission ordered 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."[12] Despite Sichenzia's

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(December 22, 2013); (v) Sichenzia Ross Friedman Ference LLP ("Sichenzia") (January 14, 2014); (vi) Louis Brilleman ("Brilleman") (January 14, 2014); and (vii) The Securities Transfer Association, Inc. ("STA") (January 14, 2014). The Comment Letters are available at http://www.sec.gov/comments/sr-dtc-2013-11/dtc201311.shtml.

[5] *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).

[6] Capitalized terms used but not defined herein shall have the meanings ascribed to those terms in the Filing.

[7] *See* Sichenzia comment letter at 2-3 (proposing that "DTC amend the 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").

[8] Rule 22 provides that DTC Participants are entitled to review of certainly disciplinary actions by a three-member panel. DTC Rules 22 and 6 also provide that issuers are entitled to review by a three-member panel where DTC determines not to accept their securities as eligible for DTC services or revokes a prior determination that the securities were DTC-eligible. Neither Rule 22 nor Rule 6 refer to Global Locks or Deposit Chills which are restrictions on services to securities previously made eligible for DTC services.

[9] *See* Exchange Act, Section 17A(b)(3)(H), 15 U.S.C. § 78q-1(b)(3)(H).

[10] *See* Exchange Act, Section 17A(b)(5)(B), 15 U.S.C. §78q-1(b)(5)(B).

[11] *See IPWG,* 2012 SEC LEXIS 844, at *24. The Commission did not address the subject of Deposit Chills. DTC has nonetheless determined to provide fair procedures to issuers in connection with Deposit Chills.

[12] *Id.* at *32.

assertion to the contrary, the Commission did not direct DTC to apply Rule 22 to issuers of Globally Locked securities or otherwise specify the nature of the fair procedures that DTC must provide to issuers. Notably, the Commission did refer to Rule 22 in *IPWG*,[13] but did not conclude that DTC should apply these (or any particular) procedures to issuers seeking to challenge a Global Lock. Rather than requiring a Rule 22 hearing, the Commission left the specifics of the fair procedures to DTC, directing it 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." The Filing codifies DTC's response to the Commission's mandate.

In its only post-*IPWG* ruling regarding DTC's obligations under Section 17A(b)(3)(H), the Commission similarly did not require DTC to apply Rule 22 procedures to an issuer challenging a Global Lock or require that DTC otherwise provide any form of testimonial or oral hearing before a panel.[14] In *ATIG*, a globally locked issuer sought a stay pending a decision on the merits of its claim that DTC had imposed a Global Lock in violation of Section 17A(b)(3)(H). In deciding the stay motion, the Commission recited in detail the fair procedures that DTC had provided to the issuer, which did not include Rule 22 procedures or any sort of testimonial or oral hearing.[15] On the basis of those procedures,[16] the Commission denied the request for a stay, stating that "it did not appear to be a strong likelihood that [the issuer] will succeed on the merits" of the Petition.[17]

The STA and Kogan further argue that the DTC restriction process fails to meet constitutionally prescribed due process standards.[18] They are incorrect for several

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[13] *See, e.g., id.* at *22.

[14] *See 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. 3-15431, 7 (Oct. 7, 2013) ("*ATIG*"), available at http://www.sec.gov/litigation/opinions/2013/34-70620.pdf.

[15] The Commission observed that:

> DTC informed Atlantis in writing that it had imposed the Deposit Chill because "unusually large deposits" of Atlantis shares at DTC raised "substantial questions as to whether [the] shares are freely tradable." DTC provided Atlantis a template of a legal opinion letter that was required to lift the Deposit Chill, but Atlantis never submitted one.
>
> After learning of the Commission enforcement action against TJM, DTC imposed a Global Lock on Atlantis's shares. DTC informed Atlantis in writing that it had done so based on allegations that TJM had engaged in an unregistered distribution of Atlantis shares when no exemption from registration was available. Atlantis requested a hearing, and DTC reviewed a proposed legal opinion letter Atlantis submitted in an effort to lift the Global Lock.

ATIG at 7.

[16] The Commission also noted that "DTC's statutory mandate to 'protect investors and the public interest' through accurate settlement of transactions which outweighs any harm that [the issuer] may have suffered as a result of the Deposit Chill and Global Lock."

[17] *ATIG* at 7. The parties in the *ATIG* proceeding are awaiting the Commission's determination on the merits of *ATIG's* petition.

[18] *See, e.g.,* Kogan comment letter at 4; STA comment letter at 5.

reasons. As noted above, DTC's obligations as a clearing corporation are established by Section 17A(b)(3)(H) and not by the standards of the Fourteenth Amendment's due process clause. DTC is not a state actor and not subject to constitutional requirements. In any event, even if due process standards did apply, DTC's fair procedures provide issuers with the process that is due, and an evidentiary or oral hearing would still not be required.[19]

2. *Internal Appeals are Neither Appropriate Nor Necessary*

(A)

In addition to Sichenzia seeking a Rule 22-type hearing when DTC makes an initial decision to impose restrictions, the STA requests that when the initial decision to impose a restriction is made, the issuer should be granted an internal appeal to a DTC hearing panel and be "afforded the due process protections" under Rule 22.[20] The STA's reasoning is that: (1) the "opportunity for an appeal will assure all those participating in the decision-making process give serious consideration to their responsibilities;" and (2) although an appeal to the Commission is available, it is "impractical" given the time delays and costs.[21] These arguments are groundless.

First, the STA's suggestion that an internal appeal is necessary to ensure "seriousness" is without merit. DTC devotes substantial human and financial resources to its compliance function relative to restrictions. Second, to the extent that the STA purportedly is concerned with delays and costs, the STA contradicts its own argument by requesting that an additional level of review be injected into the review process. The most expeditious and cost efficient manner to proceed is for DTC to make its determination as set forth in the proposed rules and then, if adverse to the issuer, for the issuer to appeal the determination to the Commission.

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[19] *See generally Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976) ("The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision making in all circumstances. The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it' ... [and]... procedures [must] be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' to insure that they are given a meaningful opportunity to present their case.") (citations omitted); *Chauffeur's Training Sch., Inc. v. Spellings*, 478 F.3d 117 (2d Cir. 2007) (holding that Department of Education not required to hold oral hearing before assessing against school; record could be established by written submissions, under the Administrative Procedure Act); *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 13 (1st Cir. 2006) (finding that Environmental Protection Agency not required to hold formal evidentiary hearing before denying request for a thermal variance; deferred to EPA's determination that no evidentiary hearing even in light of language of Clean Water Act requiring "public hearing"); *Basciano v. Herkimer*, 605 F.2d 605 (2d Cir. 1978) (holding that oral hearing was not required for City's Employees' Retirement System's Medical Division denial of accident disability retirement benefits to plaintiff; evidence can be presented as effectively in writing as orally; benefits of a trial-type hearing outweighed by substantial fiscal and administrative burdens on agency).

[20] *See* STA comment letter at 5.

[21] *Id.*

(B)

In further advocating for an internal appeal process, the STA references rules issued by FINRA and NASADQ that allow for some manner of internal appeal in what the STA mistakenly refers to as "similar contexts."[22] In propounding this argument, the STA fundamentally misunderstands the roles played by FINRA and NASDAQ in the securities industry as compared to the role played by DTC. As explained below, these comparisons are inapposite.

FINRA is a national securities association charged with oversight of member securities firms in order to "safeguard the investing public against fraud and bad practices."[23] FINRA has a specific disciplinary and adjudicatory mandate to "prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade. . . ."[24] FINRA disciplines registered brokers, detects and prevents violations of the securities laws, including fraudulent activities such as insider trading, resolves securities disputes among brokers and investors including arbitrations and mediations around the country.[25]

NASDAQ is a national securities exchange, registered by the Commission under Section 6 of the Exchange Act.[26] As a national securities exchange, NASDAQ, like FINRA, also has a specific disciplinary and adjudicatory statutory mandate "to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade . . .."[27] In addition, NASDAQ has "broad discretionary authority over the initial and continued listing of securities in NASDAQ in order to maintain the quality of and public confidence in its market, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest."[28]

DTC has a different role in the securities industry. It is a registered clearing corporation with a mandate "to facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transactions for which it is responsible, to safeguard securities and funds in its custody or control or for which it is responsible. . ."[29] DTC does not perform a policing function to root out fraudulent and manipulative conduct in violation of the securities laws. There is no basis to compare FINRA and NASDAQ's adjudicatory procedures arising from their policing functions with the fair procedures provided by DTC for compliance with its eligibility standards.

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[22] *See* STA comment letter at 5.
[23] *See* http://www.finra.org/AboutFINRA/WhatWeDo/.
[24] Exchange Act, Section 15A(b)(6), 15 U.S.C. § 78o–3(b)(6).
[25] http://www.finra.org/AboutFINRA/.
[26] *See* 15 U.S.C. §§ 78f & 78c(a)(26); Findings, Opinion, and Order of the Comm'n, Exch. Act. Rel. No. 53, 128 (Jan. 13, 2006), 71 Fed. Reg. 3,550 (Jan. 23, 2006).
[27] Exchange Act, Section 6(b)(5), 15 U.S.C. § 78f(b)(5).
[28] NASDAQ Rule 5100.
[29] Exchange Act, Section 17A(b)(3)(A), 15 U.S.C. § 78q-1(b)(3)(A).

Turning to the STA's specific references to FINRA Rule 6490 and NASDAQ Rule 5815, the STA fails to recognize a fundamental procedural difference between these rules of a securities exchange and a national securities association and DTC's proposed Rules 22(A) and 22(B). The FINRA and NASDAQ adjudicatory procedures involve appeals from fact-intensive determinations. In contrast, DTC's procedures, as described in the Filing, are premised on straightforward legal presentations and are not predicated on intensive fact finding, as is the case with FINRA regulatory intervention or NASDAQ disciplinary actions.

FINRA Rule 6490 grants FINRA "regulatory authority" and "discretionary power" to not process a corporate action based on a detailed factual inquiry into the governing factors, including "indicators of potential fraud."[30] The FINRA appeal process arises from this fact finding process and, even at that, consists only of *written* submissions, not a testimonial or oral hearing as sought here by the STA.

NASDAQ Rule 5815 applies to listing and delisting determinations. NASDAQ utilizes its broad discretion "to deny initial listing, apply additional or more stringent criteria for the initial or continued listing of particular securities, or suspend or delist particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued listing of the securities on NASDAQ inadvisable or unwarranted in the opinion of NASDAQ, even though the securities meet all enumerated criteria for initial or continued listing on NASDAQ."[31] NASDAQ Rule 5815 provides that the issuer may request in writing that the hearing panel review the matter in a written or an oral hearing. Again, as in the case of the FINRA rule cited by the STA, the NASDAQ internal appellate process arises from detailed fact finding by the regulator in order to render the underlying decision. Indeed, reflecting the fact intensive nature of the review, NASDAQ requires the applicant to pay an upfront $10,000 fee in order to cover the costs of reviewing the contentious factual record.[32]

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[30] *See* Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed FINRA Rule 6490 (Processing of Company-Related Actions), To Clarify the Scope of FINRA's Authority When Processing Documents Related to Announcements for Company-Related Actions for Non-Exchange Listed Securities and To Implement Fees for Such Services, 74 Fed. Reg. 68648, 68649 (December 17, 2009); *see* FINRA Rule 6490(d)(3) (detailing the deficiency determination factors: (i) the issuer provided incomplete or inaccurate documentation; (ii) issuer fulfilled its reporting requirements; (iii) FINRA has actual knowledge that the issuer or related party to the corporate action are the subject of a pending, adjudicated or settled regulatory action or investigation by a federal, state or foreign regulatory agency, or a self-regulatory organization; or a civil or criminal action related to fraud or securities laws violations; (iv) FINRA has knowledge that the issuer or related party may be potentially involved in fraudulent activities related to the securities markets and/or pose a threat to public investors; or (v) that there is significant uncertainty in the settlement and clearance process for the security).

[31] NASDAQ Rule 5100.

[32] NASDAQ Rule 5815(a)(3) requires payment of a $10,000 hearing fee. In explaining the basis for this high fee, NASDAQ enumerated "significant Staff time and resources to prepare for and conduct hearings and appeals. . . .In addition, appeals have become more complicated and contentious than when fees were last modified. . . . . In response to increasing complexities, NASDAQ has made new hires in its investigatory group and on several occasions engaged an outside law firm or an investigative firm to assist in connection with matters under review." Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Modify Fees For Review

In stark contrast, DTC's review processes in connection with Deposit Chills and Global Locks do not arise from contested factual records, as is the case with the referenced FINRA and NASDAQ procedures. DTC's proposed Rules 22(A) and 22(B) do not contemplate that DTC will engage in independent fact finding. Rather, the proposed rules place the responsibility on the issuer which is subject to a Deposit Chill or Global Lock to demonstrate that it meets DTC's requirements to avoid the restriction. In the case of Deposit Chills the burden is on the issuer's counsel to demonstrate that the securities satisfy DTC's eligibility requirements, as described in detail in the Filing.[33] So long as the issuer's proffered legal opinion is consistent with DTC's eligibility criteria, the restriction will be avoided or lifted. DTC does not engage in a factual investigation in any way analogous to the FINRA and NASDAQ regulatory oversight processes. Issuer's counsel is obligated to determine the relevant facts and provide its opinion accordingly.

The analysis in the case of Global Locks is even more straightforward. It only requires that the issuer demonstrate that it was misidentified as the defendant named in the proceeding and its shares are not the subject of the applicable enforcement proceeding.[34] There is no fact finding.

Thus, as reflected in proposed Rules 22(A) and 22(B) and explained in detail in the Filing, DTC's process for determinations regarding Deposit Chills and Global Locks focus on the legal question of DTC eligibility. Again, the DTC process is not analogous to the fact finding underlying FINRA Rule 5815 and NASDAQ Rule 6490 proceedings. These procedures do not constitute models for DTC.[35]

(C)

Finally, the STA's request for "one additional modification"[36] is highly inappropriate. The STA requests that the three-person Rule 22 panel include "one person that is employed by, or a partner of, a registered transfer agent."[37] First, it presupposes the need for some type of testimonial or oral hearing before a panel which, as noted above, is neither legally required nor practically indicated. Second, this proposal is rife

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of Delisting Determinations and Appeal of Panel Decisions, Securities Exchange Act Release No. 34-68676; File No. SR-NASDAQ-2013-004, 4 (January 16, 2013); *see also* FINRA Rule 6490(c) (requiring payment of a $4,000 fee review fee).

[33] *See* Filing at 4-5 (quoting DTC's Operational Arrangements, Section I.A.2).

[34] *See* Filing at 10-11.

[35] In urging that DTC should provide issuers with an internal appellate review process (STA comment letter at 5), the STA fails to note that the internal appeal under NASDAQ Rule 6490 often takes longer than six months. *See* Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change to Modify Certain Disclosure Requirements to Require Issuers to Publicly Describe the Specific Basis and Concern Identified by NASDAQ When a Listed Issuer Does Not Meet a Listing Standard and Give NASDAQ the Authority to Make a Public Announcement When a Listed Issuer Fails to Make a Public Announcement, Securities Exchange Act Release No. 34-68343, File No. SR-NASDAQ-2012-118, 6 (December 3, 2012) ("[The] Exchange's rules give listed issuers the right to appeal a delisting determination or public reprimand letter. This process at the first appeal level involving a hearing panel review can take up to six months.").

[36] STA comment letter at 5.

[37] *Id.* at 6.

with inherent conflicts. Certain transfer agents have been found to issue physical or electronic certificates without proper diligence and oversight, thereby contributing to and even facilitating the distribution of securities that may not satisfy DTC eligibility requirements and are nevertheless deposited into DTC's system. There is no principled basis for blurring the respective functions of transfer agents and DTC under Section 17A.

3. *DTC Has Met the Standards Articulated by the Commission to Impose Restrictions Prior to Notice*

Kogan and Sichenzia comment that DTC's "right" under the proposed rules to impose a Deposit Chill or Global Lock prior to giving notice should be restricted, at minimum, to a clearly defined "imminent harm or injury" to DTC.[38]

In the first instance, DTC believes that it has addressed adequately the imminent harm issue in its Filing.[39] DTC has provided meaningful standards to justify imposition of restrictions in those cases where prior notice is not feasible. These provisions have been developed in keeping with DTC's statutory mandate as a registered clearing agency to "remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions, and, in general, to protect investors and the public interest."[40]

In *IPWG*, the Commission ruled that a case-by-case analysis, rather than a set of defined circumstances, should inform DTC's determination to impose a restriction prior to notice:

> If DTC believes that circumstances exist that justify imposing a suspension of services with respect to an issuer's securities in advance of being able to provide the issuer with notice and an opportunity to be heard on the suspension, it may do so. However, in such circumstances, these processes should balance the identifiable need for emergency action with the issuer's right to fair procedures under the Exchange Act. Under such procedures, DTC would be authorized to act to avert an imminent harm, but it could not maintain such a suspension indefinitely without providing expedited fair process to the affected issuer.[41]

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[38] *See* Kogan comment letter at 3; Sichenzia comment letter at 4.

[39] *See* Filing at 13-14; proposed Rule 22(A) §2; proposed Rule 22(B) §2.

[40] Exchange Act, Section 17A(b)(3)(F), 15 U.S.C. § 78q-1(b)(3)(F). DTC is also a self-regulatory organization; *See* Exchange Act, Section 3(a)(26), 15 U.S.C. § 78c(a)(26).

[41] *See* Filing at 13-14, citing *IPWG*, 2012 SEC LEXIS 844, at *29 (footnote omitted); *see also ATIG* at 3, fn. 5 (noting that DTC may, consistent with *IPWG*, impose a Deposit Chill or Global Lock without advance notice in order to avert an imminent harm). Additionally, in terms of "expedited fair process," the proposed rules already provide an expedited timeframe for review for restrictions imposed prior to notice. Specifically, where the Deposit Chill was imposed prior to notice, DTC is required to provide a decision within ten business days of receiving a response from an issuer, rather than the usual allotted twenty business days. *See* proposed Rule 22(A) §2(c).

As explained in the Filing, to facilitate book-entry transfer and other services that DTC provides for its Participants, DTC holds securities deposited for book-entry services in fungible bulk.[42] DTC maintains a robust monitoring system for monitoring compliance with governing law including, without limitation, the relevant provisions of the Bank Secrecy Act ("BSA").[43] When its monitoring system detects that Participants may be in the process of currently and consistently depositing ineligible securities into the system, DTC may impose a Deposit Chill without prior notice to stop further deposits of such ineligible securities. This is essential in order to protect DTC participants, the banks and broker dealers that hold securities on the books of DTC, and their customers, the investing public, from having their indirect holding of securities compromised by the inclusion of improperly offered securities. Nonetheless, consistent with the *IPWG* opinion, proposed Rule 22(A) provides issuers with the opportunity – *on an expedited basis* – to demonstrate that the securities are, in fact, eligible for continued DTC services.[44] Over the past months, as DTC has developed and tested this procedure, in the majority of cases DTC has given prior notice to issuers.

Similarly, when DTC becomes aware that the Commission has commenced a proceeding alleging recent violations of Section 5 of the Securities Act or other applicable provisions of law relating to the free tradeability of securities deposited at DTC, a Global Lock may be imposed before giving notice based upon the Commission's categorical findings that the shares have been distributed illegally. Thus, where the Commission alleges that not only was the proffered exemption from registration illegitimate, but that no other valid exemption was available, it is appropriate to impose the Global Lock as soon as possible. Otherwise, DTC will continue to process transactions in an issue where the Commission has already determined that the shares are not freely tradeable and DTC's fungible bulk is tainted,[45] and in doing so, expose the marketplace to harm in contravention to its statutory mandate. Proposed Rule 22(B) provides the issuer with an expedited opportunity to demonstrate that a mistake has been made.[46] Again, as the new procedures have been developed and tested, and as would be expected consistent with the exercise of prudent judgment, DTC has given prior notice to issuers in the majority of cases.

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[42] *See* Filing at 3.

[43] *See* Filing at 5, citing 31 U.S.C. 5318 (authorizing Secretary of the Treasury to require financial institutions to establish AML procedures); 31 CFR 1020.210 (AML standards for certain financial institutions); *see also* 31 CFR 500.202 (prohibiting, inter alia, dealing in a security registered in the name of a person subject to Office of Foreign Asset Controls sanctions).

[44] *See* proposed Rule 22(A) § 2(c).

[45] Shatto queries whether DTC should "sequester" or mark certificates so that the "suspected securities would not find their way back to any market." Shatto comment letter at 1. This proposal is not feasible, given that the securities are held in fungible bulk.

[46] *See* proposed Rule 22(B) § 2(c).

4. *It Would Neither Be Appropriate Nor Feasible For DTC to Provide a Forum For Issuers to Mount a Collateral Attack on the Commission's Allegations in Pending Enforcement Actions*

(A)

Kogan comments that when DTC relies on the filing of an enforcement action alleging violation of Section 5 of the Securities Act as the basis for imposing a Global Lock, DTC is required to provide a duplicative and competing forum for the issuer to litigate the same allegations asserted in the regulatory proceeding.[47] Kogan fails to provide any authority for this proposition. DTC does not possess adjudicatory powers or authority with respect to marketplace participants. As a registered clearing corporation, DTC is bound by the Securities Act, the Exchange Act, the relevant provisions of the BSA, and the positions taken by law enforcement and regulatory agencies, such as the Commission, and cannot be in the position of second guessing, or undermining regulatory or law enforcement initiatives. Any such requirement would be improper from legal, regulatory and public policy perspectives.[48]

(B)

Alternatively, noting that "enforcement proceedings can drag on for years"[49] or that in some cases "Commission's staff may not be willing to provide any certainty as to the status of an action,"[50] the STA and Sichenzia protest that a Global Lock should be lifted one year after its imposition, or that the issuer be able to re-apply for eligibility, even where there is an ongoing enforcement proceeding relating to the securities. Again, as noted above, this Section 19(b) rule approval process is not the proper forum for interested parties to address their concerns regarding the timing of the regulatory process. In any event, this argument ignores the fact that DTC is bound by the federal statutes and securities laws as well as determinations underlying law enforcement and regulatory enforcement decisions and cannot front-run the ultimate resolution of either.

5. *The DTC Officer Has the Requisite Level of Skill and Independence*

The STA expresses concern[51] that the Officer, as defined in Section 3.1 of DTC's Bylaws, will not be sufficiently skilled or independent to make Deposit Chill

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[47] *See* Kogan comment letter at 5.

[48] *Cf. FDIC v. Mallen*, 486 U.S. 230, 240-241 (1988) (holding that determination by independent body, such as grand jury indictment, provided basis to justify FDIC's suspension of employee without separate pre-suspension hearing; finding that the due process afforded with respect to suspension comported with constitutional due process); *Plaza Health Labs., Inc. v. Perales*, 878 F.2d 577, 583 (2d Cir. 1989) (holding that statute providing that Medicaid provider could be suspended on basis of indictment without any hearing comported with constitutional due process); *Gilbert v. Homar*, 520 U.S. 924, 934 (1997) (holding that criminal charges may provide basis for employee suspension without prior hearing because "an independent third party has determined that there is probable cause to believe the employee committed a serious crime"; finding that suspension of employee comported with constitutional due process).

[49] Sichenzia comment letter at 4.

[50] STA comment letter at 6-7.

[51] *See* STA comment letter at 4.

determinations. This concern is unfounded. Section 3.1 of DTC Bylaws describes the employees who serve as "officers of the Corporation" and makes clear that they are high ranking and charged with substantial responsibility. As far as "independence" is concerned, the proposed rule provides that the reviewing Officer cannot have had any role in the underlying decision to impose the restriction. The Officer will be identified to the issuer and, presumably, if the individual is deemed not suitable by the issuer, for whatever reason, that may be included in the issuer's appeal to the Commission.

The STA also urges that the "initiation of an action to impose chills should be authorized by a [*sic*] senior officers of DTC designated by the Board of DTC, or its Chief Executive Officer, to take such actions."[52] This proposal is unnecessary. Under DTC's long established procedures (that will continue under the proposed rules), the decision to impose restrictions is made by appropriate delegation of authority to a senior-level committee composed of officers drawn from DTC's Operations, Risk Management, Product Management, Application Development and Maintenance, Legal and Compliance Departments.

Finally, the STA again distorts the *IPWG* opinion, by comparing proposed Rule 22(A)'s officer review provision to FINRA Rule 9558 (Summary Proceedings for Actions Authorized by Section 15A(h)(3) of the Exchange Act).[53] FINRA Rule 9558 was referenced in passing by the Commission in *IPWG* specifically as guidance as to the notice process in connection with emergency actions. The Commission did not cite Rule 9558 to set standards for who may serve as a reviewing officer. Had the Commission intended to do so for emergency actions or otherwise, it could have done so.

6. *Issuers, Not DTC, Are Obligated to Make Disclosures to Investors*

The Commenters express concern that investors might not be able to obtain accurate information from issuers or brokers, and propose that DTC provide public disclosure about issuers which are subject to service restrictions, or even possible service restrictions. The Commenters propose a variety of mechanisms, such as a public database identifying currently restricted issuers, advance notice of DTC's contemplated restrictions before DTC makes a determination, and the disclosure of all DTC and issuer correspondence related to a determination relating to a restriction.[54] Although the Commenters recognize that such a burden should be fairly placed on the issuers, they represent that investors suffer when the issuers are, at best, non-accessible or confused, or at worst, untruthful.[55]

While DTC understands the concern of the Commenters that issuers fail to communicate information to shareholders, this obligation cannot be shifted to DTC. When imposing a Deposit Chill or Global Lock, DTC notifies the issuer and its transfer

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[52] *Id.*
[53] *Id.*
[54] *See* Bigbake comment letter at 1; Hamilton comment letter at 1-2.
[55] *Id.*

agent.[56] In addition, when imposing a Global Lock, DTC distributes an Important Notice to its Participants through electronic means. Thus, DTC notifies the involved parties and it would be inappropriate to excuse issuers and others from their obligations to otherwise notify concerned parties.

We note that Important Notices, including those relating to Global Locks, are publically available on DTC's Web site. DTC is in the process of evaluating the potential impact of similar disclosure regarding Deposit Chills, and will determine whether that disclosure is appropriate.

7. *The Form of the Restriction Notice is Appropriate*

The STA and Kogan offer misguided recommendations regarding the restriction notice letter under the proposed rules. First, the STA "believe[s] the Proposed Rule Changes should be revised to state that DTC will provide 'the reason(s) for the [Deposit Chill or Global Lock] in light of DTC's Eligibility Requirements . . .' as opposed to 'the reason(s) for the [Deposit Chill or Global Lock], including the legal authority upon which it was imposed.'"[57] The proposed rules provide that the notice will contain the reasons for the restriction, as well as the required form of response, so that the issuer is able to respond to the issues raised in the notice. This explicitly includes references to DTC's eligibility standards. Indeed, DTC has been using such forms of notice and STA members exposed to these notices are well aware that the notices *do* cite to legal and regulatory authority, and *do* set forth the basis for the restriction as it relates to free tradeability and DTC's eligibility standards.

Kogan comments that (i) the proposed rules do not provide for contemporaneous notice to the Commission and thus denies the issuer the ability to seek a stay, and (ii) that when DTC is unable to deliver the notice to the issuer, it should not deliver the notice to the transfer agent,[58] but rather to the registered agent for the service of process or the Secretary of State in the state of incorporation.[59] First, DTC need not replicate in its rules requirements of the Commission's Rules of Practice.[60] Indeed, Kogan, as counsel for the issuer in *ATIG* faced no procedural barrier in seeking a stay of DTC's decision in that proceeding.

As to Kogan's second point, Section 3(d) of proposed Rule 22(A) and Section 5(c) of proposed Rule 22(B) already specifically provide for service on either the "agent for the service of process designated by the issuer or to the Secretary of State or any state securities agency of the State in which the issuer is incorporated."

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[56] The STA commented that notice should be contemporaneously provided to the transfer agent. This is and will continue to be DTC's practice. The Filing inadvertently omitted this reference and DTC is filing a corrective amendment herewith.

[57] STA comment letter at 4.

[58] The STA also commented that notice should be contemporaneously provided to the transfer agent. This is DTC's current practice, and its omission from the Filing was inadvertent and will be the subject of an amendment.

[59] Kogan comment letter at 3.

[60] *See* Rule 420(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.420.

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

Brilleman comments that the proposed rules do not provide fair procedures for Deposit Chills imposed prior to the *IPWG* opinion.[61] The proposed rules do not explicitly govern fair procedures for Deposit Chills or Global Locks imposed prior to *IPWG*, which 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."[62] Nevertheless, for securities that were restricted prior to the *IPWG* opinion, if the issuers have requested review, DTC has been following these procedures, and will continue to provide the same fair procedures as for securities which are subject to restrictions post-*IPWG*.

Brilleman additionally requests that a Deposit Chill, especially one imposed prior to *IPWG*, be lifted automatically after a certain period from the date of its imposition.[63] 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 as set forth in proposed Rule 22(B).[64] For chills imposed before *IPWG*, DTC will offer those same procedures upon request by the issuer.

9. *The Defined Scope of the Proposed Rules is Appropriate*

The STA and Sichenzia query what fair procedures are available to an issuer which is subject to a restriction on deposits or book-entry services for reasons other than those described in the preambles to the proposed rules.[65] The proposed rules clearly demonstrate that while DTC cannot foreclose the possibility that it would find it necessary to impose a Global Lock or Deposit Chill under other circumstances, the fair procedures contained in the rules "shall be applicable" in such circumstances:

> No provision of this Rule 22[(A)/(B)] shall:
> ...
> be deemed to require the Corporation to take any action, refrain from taking any action or disclose any information that is prohibited to be disclosed, or otherwise do anything that is inconsistent with its obligations under the Securities Act, the Bank Secrecy Act or any rules, regulations or guidance promulgated thereunder, including rules or regulations promulgated by OFAC or executive orders related thereto; ***provided however*, that if the Corporation imposes a [Deposit**

[61] *See* Brilleman comment letter at 1.
[62] *IPWG*, 2012 SEC LEXIS 844, at *32 (emphasis added).
[63] *See* Brilleman comment letter at 2.
[64] *See* proposed Rule 22(B) § 4.
[65] *See* STA comment letter at 3 (proposing changes to the preamble to Rule 22(A)); Sichenzia comment letter at 3-4 ("[W]e 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 its imposition.").

Chill/Global Lock] under such circumstances, the procedures set forth in this Rule [22(A)/22B] shall be applicable, unless prohibited by or inconsistent with governing law . . . .[66]

This comment by the STA and Sichenzia is incorrect.

Finally, the STA attempts to utilize this rule approval process for unrelated purposes. It seeks "fairness in other contexts," particularly with respect to transfer agent access to DTC's Fast Automated Securities Transfer (FAST) System.[67] This comment has nothing to do with proposed Rules 22(A) and 22(B) and is therefore inappropriate. DTC is prepared to address other issues with the STA in the appropriate forum.

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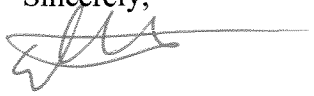
Based on the foregoing, DTC believes that the proposed rules are consistent with the Section 17A and the *IPWG* opinion. Subject to the filed amendment adding provision for notice to transfer agents, DTC urges that the proposed rules be approved as originally filed.

Sincerely,



[66] Proposed Rule 22(A) § 3(b)(iii); proposed Rule 22(B) § 5(b)(iii)) (emphasis added).
[67] *See* STA comment letter at 7, n. 3.