Proskauer» Proskauer Rose LLP 1585 Broadway New York, NY 10036-8299

Gregg M. Mashberg
Member of the Firm
d 212.969.3450
f 212.969.2900
gmashberg@proskauer.com
www.proskauer.com

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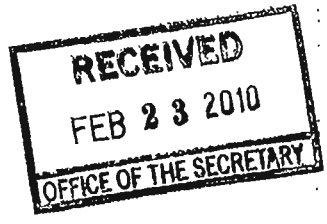

Ms. Elizabeth M. Murphy
Secretary
United States Securities and
Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Self-Regulatory Organizations; The Depository Trust Company;
Order Granting Approval of a Proposed Rule Change as Amended Relating to
FAST and DRS Limited Participant Requirements for Transfer Agents (the "Order")
Release No. 34-60196; File No. SR-DTC-2006-16

Dear Ms. Murphy:

This firm is counsel to The Depository Trust Company ("DTC"). Enclosed please find the Supplemental Response of The Depository Trust Company to the Securities Transfer Association, Inc.'s Petition For Review.

Thank you for your cooperation.

Sincerely yours,

Gregg M. Mashberg

Cc: James A. Brigagliano
Jerry W. Carpenter
Susan M. Petersen

UNITED STATES OF AMERICA
SECURITIES AND EXCHANGE COMMISSION

Re: Securities Exchange Act Rel. No. 34-60196 (June 30, 2009): File No. SR-DTC-2006-16

SUPPLEMENTAL RESPONSE OF THE DEPOSITORY TRUST COMPANY TO THE SECURITIES TRANSFER ASSOCIATION, INC.'S PETITION FOR REVIEW

Respondent, The Depository Trust Company ("DTC"), by its undersigned counsel, hereby submits this supplemental response to the petition filed by Petitioner the Securities Transfer Association, Inc. ("STA" or "Petitioner"). By that Petition, the STA seeks to have the Commission review and set aside the June 30, 2009 order[1] (the "Approval Order") approving DTC's rule filing relating to the standards by which DTC may authorize transfer agents to participate in DTC's Fast Automated Securities Transfer program ("FAST").

This supplemental response, submitted in response to the Commission staff's request, focuses on the assertion in the "Reply of Petitioner," filed with the Commission on November 20, 2009, that Section 17A(b)(3)(H) of the Securities Exchange Act of 1934 ("Exchange Act") is somehow applicable to this challenge to the Approval Order.[2] As demonstrated below, this provision of the Exchange Act does not provide a basis to upset the Approval Order.

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[1] *See* Securities Exchange Act Release No. 60196 (June 30, 2009),71 FR 33496 (July 13, 2009).

[2] Section 17A(b)(3) provides that a clearing agency shall not be registered unless the Commission determines that:

> (H) The rules of the clearing agency are in accordance with the provisions of paragraph (5) of this subsection, and in general provide a fair procedure with respect to the disciplining of participants, the denial of participation to any person seeking participation therein, and the prohibition or limitation by the clearing agency of any person with respect to access to services offered by the clearing agency.

Argument

(1)

Nothing in Section 17A(b)(3)(H) or its legislative history supports the STA's challenge to the Approval Order. This provision of the Exchange Act only applies to the relationship between DTC and the "persons" to which it provides "services;" *i.e.*, its participants. As explained below, and subject only to an exception that proves the rule, Section 17A(b)(3)(H) does not impose any obligations on DTC with respect to transfer agents and other non-participants such as issuers

DTC is a registered clearing agency and securities depository. It provides services to the persons that constitute its Participants.[3] Section 17A enumerates the

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[3] As stated by the Commission, in approving DTC's application for registration, as a clearing agency DTC:

> [A]ccepts deposits of securities from broker-dealers, banks and other financial institutions (collectively referred to as "Participants"); credits those securities to the general free accounts of the depositing Participants; and, pursuant to instructions of the Participants, effects book-entry deliveries of securities (including pledges) among Participants (and participating pledgee banks). *See, e.g., DTC, Participant Operating Procedures*, §§ B and C. The physical securities deposited with a securities depository are held in a fungible bulk, no significant portion of which is identified or identifiable to a particular participant or pledgee; each participant or pledgee having securities of a given issue credited to its account has a pro-rata interest in the physical securities of the issue held in custody by the securities depository in its nominee name. *See* June 4 SEC Order at 35041. Depositories also may provide facilities for payment by Participants to other Participants in connection with book-entry deliveries of securities.

SEC Rel. No. 19678, 48 Fed. Reg. 17603, 17604, n. 5 (April 25, 1983); *see also, e.g.*, New York U.C.C. §8-102 OFF. CMT. 14 ("clearing corporations hold[] securities for their participants, banks acting as securities custodians, and brokers holding securities on behalf of their customers."); *Olde Monmouth Stock Transfer Co., Inc., v. Depository Trust & Clearing Corporation* . 485 F. Supp. 2d 387, 388 (S.D.N.Y. 2007) (describing DTC).

persons who may become clearing agency Participants.[4] In general, transfer agents are not within the enumerated categories and, indeed, DTC does not maintain accounts for transfer agents nor otherwise provide services to transfer agents.

The sole exception is DRS limited participants, a subset of FAST agents, that DTC has designated as limited participants and whom DTC has authorized to provide DRS services.[5] In that case, and that case only, DRS limited participants *are* accorded hearing rights pursuant to DTC's Rule 22 in connection with rejection of any application to become a DRS limited participant or a determination by DTC to terminate limited participant status.[6] Accordingly, to the extent that the STA challenges the Approval Order because it purportedly does not comply with Section 17A(b)(3)(H) with respect to agents seeking to become or who are already DRS limited participants, the challenge is baseless. Rule 22 provides procedural safeguards to which participants, including DRS limited participants, may be entitled, as contemplated by Section 17A(b)(3)(H). With respect to other transfer agents, including FAST agents, by stark contrast, these entities are, by definition, not participants or limited participants and are *not* subject to the procedures set forth in Rule 22. The STA's challenge to the Approval Order on these grounds must be seen for what it is: a collateral challenge to the relationship between transfer agents and DTC that has been enshrined in the Commission's rule making for

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[4] Section 17A(b)(3)(B) authorizes the following persons to become clearing agency participants: (i) registered broker or dealer; (ii) others registered clearing agency; (iii) registered investment company; (iv) bank, (v) insurance company; or (vi) other person or class of persons the Commission deems appropriate.

[5] *See* Securities Exchange Act Release No. 37931 (November 7, 1996), 61 FR 58600 (November 15, 1996), [File No. SR-DTC-96-15]. As a result of the Commission's approval of DTC's DRS program, DTC was authorized by the Commission to create a class of limited participants to perform the DRS function. *See* Section 17A(b)(3)(B)(iv).

[6] DRS limited participants are subject to certain provisions of DTC's Rules. *See* Securities Exchange Act Release No. 34-37931 (November 7, 1996), [File No. SR-DTC-96-15]. The Attachment to the Direct Registration System Limited Participant Account Agreement identifies certain DTC Rules that do apply to these limited participants, including Rule 22: "Rule 22 establishes a Participant's right to appeal DTC's denial of Participant status and the imposition of sanctions against Participants."

over a decade. Petitioner's reliance on Section 17A(b)(3)(H) is essentially moot when it comes to DRS limited participants and otherwise inapplicable when it comes to transfer agents.

(2)

Section 17A's legislative history confirms that the "fair procedure" provisions of Section 17A(b)(3)(H) are directed to clearing agency participants and persons seeking to become Participants. They are not directed to transfer agents or other third parties, such as issuers.[7]

As described by the Senate Report to the bill (S. 249) that contained the amendments that ultimately became Section 17A of the Exchange Act,[8] Section 17A's "fair procedures" provisions were "analogous" to other provisions of the Exchange Act that support the conclusion that the procedures are only applicable to a clearing agency's participants:

> This subsection [pertaining to "fair procedures"] contains procedures and standards analogous to Sections 6(c) and (d) and 15A(g) and (h) of the Exchange Act concerning the authority and responsibility of national securities exchanges and registered securities associations with respect to the eligibility of members, denials of membership, disciplinary procedures, prohibitions or limitations on access and summary actions. As self-regulatory organizations under this title, registered [sic] responsibilities over participants and the conduct of participants. For an analysis of these provisions, see the analysis of section 6 supra.

S. Rep. No. 94-75, 1975 U.S.C.C.A.N. 179.

Section 6(c) and (d) and Section 15A(g) and (h) pertain to membership and discipline of members of registered exchanges and registered securities

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[7] *See, infra*, n. 11.

[8] *See* S. Rep. No. 94-75, 1975 U.S.C.C.A.N. 179.

associations, and persons associated with members, respectively. In both of these provisions, deemed to be "analogous" to disciplinary and related provisions applicable to clearing agencies under Section 17A(b)(3)(H), the only "persons" who may be disciplined or "prohibited or limited with respect to access to services" offered by an exchange or association, are "members" thereof.[9] And, under both analogous statutes, the "persons" who may become "members," are strictly limited to broker-dealers.[10]

In the context of clearing agencies, the persons "analogous" to an exchange or association's members are the clearing agencies' participants. Accordingly, 17A(b)(3)(H) has no applicability to transfer agents and other non-participants.

Further, Section 6(b)(5) demonstrates that Congress, in enacting the 1975 Amendments to the Exchange Act, knew how to prescribe SRO operating standards covering persons, other than the SROs members (or participants), when that was its intent. Section 6(b)(5) provides, *inter alia*, that an exchange's rules should not be "designed to permit unfair discrimination between customers, issuers, brokers, or dealers ...." By contrast, Section 6, when elsewhere referring to disciplinary procedures and sanctions applicable to an exchange's members (*see* Section 6(c) and (d)), does not include "customers" or "issuers" among the persons entitled to procedural safeguards. Similarly, the "analogous" provisions of Section 17A(b)(3)(H) do not specifically identify anybody other than

[9] Section 6(d)(2); Section 15A(h)(2). "Associated" persons are also subject to the procedural safeguards established under Sections 6 and 15A. There is no analogous class of protected "Associated" persons established under Section 17A(b)(3)(H).

[10] Section 6(c)(1); Section 15A(g).

participants and those seeking to become participants as being subject to rules that provide "fair procedures." In enacting the 1975 Amendments to the Exchange Act, Congress knew how to refer to third parties such as issuers, customers and, indeed, transfer agents.[11] It did not do so – presumably intentionally – in the disciplinary and sanctions provisions of Sections 6, 15A and 17A. *See generally*, *Southwestern Pa. Growth Alliance v. Browner*, 121 F.3d 106, 120 (3d Cir. 1997). The STA's reliance on Section 17A(b)(3)(H) in challenging the Approval Order is baseless.

In sum, the Senate Report's identification of Section 17A(b)(3)(H) with Sections 6 and 15A supports the conclusion that Section 17A(b)(3)(H) should not be applied to transfer agents or other third parties not constituting clearing agency participants.[12]

(3)

Finally, it is important for the Commission to take careful account of the important policy reasons for not opening the floodgates to a hearing process for any non-participants who would assert that they have been denied access to DTC services. This is the inevitable result of the STA's broad –brush reliance on Section 17A(b)(3)(H) and must not be permitted.

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[11] *See* Section 17A(c) (providing for registration of transfer agents).

[12] DTC does, as a matter of its own internal policies, provide the equivalent of rule-based "fair procedures" to issuers who have contested certain DTC actions. In the event that an eligible issue is deemed ineligible for DTC services, the issuer of that security is entitled to invoke Rule 22 of DTC's Rules. Otherwise, issuers do not have rights under Rule 22, although as a practical matter, DTC does consider complaints from issuers and responds to their inquiries. None of this is based on Section 17A(b)(3)(H), which is not applicable to issuers and other non-participants.

Section 17A(b)(3)(H) obligates clearing agencies to provide fair procedures to participants against whom disciplinary action has been taken or sanctions have been imposed. Clearing agencies exist to "facilitate the prompt and accurate clearance and settlement of securities transactions" among their participants. *See* Section 17A(b)(3)(A). Given this essential feature of the indirect holding system, it is natural that Congress required clearing agencies to provide their participants with certain procedural safeguards as an adjunct to the clearing agencies' statutory obligation to facilitate participant transactions. Broadening this obligation to third parties such as transfer agents, issuers and others, who do not otherwise meet the criteria to become participants, however, finds no underlying support or rationale in Section 17A. Congress did not charge clearing agencies with the obligation to facilitate transfer agent operations; to the contrary, as agents of issuers, transfer agents provide their services to DTC. There is no discernable rationale for treating transfer agents and other third parties as if they held the status of participants.

Even beyond the absence of any policy basis for treating transfer agents and other non-participants as if they were participants, the notion that disgruntled transfer agents, issuers and other third parties are entitled to demand that DTC provide hearings must give the Commission serious pause. DTC does not have the administrative infrastructure in place to manage a hearing system that could be as extensive as the imaginations of various players in the marketplace. Its existing fee structure, as approved by the Commission, does not contemplate the establishment of a hearing system for transfer agents and other non-participants.

Such a system, whose ultimate contours and scope cannot be foreseen, would require DTC to expend substantial financial and human resources. That would inevitably translate into increased fees to participants and diversion of DTC staff from the depository's mission: the prompt and accurate clearance and settlement of participant transactions. This result, the increase in costs and decrease in efficiency is, of course, precisely the opposite of what Congress intended in enacting Section 17A.[13]

Conclusion

The Commission should uphold the Approval Order and the Petition should be denied.

New York, New York
February 23, 2010

PROSKAUER ROSE LLP

By: _____

Gregg M. Mashberg
Edward Kwalwasser
1585 Broadway
New York, NY 10036
212.969.3450 (p)
212.969.2900 (f)
gmashberg@proskauer.com

Attorneys for The Depository Trust Company

[13] As DTC has otherwise emphasized, non-participant third parties are entitled to participate in the Commission's rule-making process, which affords them the opportunity to comment and the Commission to rule on any proposal requiring a rule change. The transfer agent industry has certainly made extensive use of its right to participate in the rule-making in this case.