

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-55940; File No. SR-DTC-2007-04)

June 21, 2007

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing of a Proposed Rule Change Relating to a Policy Statement on the Eligibility of Foreign Securities

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ notice is hereby given that on April 19, 2007, The Depository Trust Company ("DTC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by DTC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would add a new Policy Statement on the Eligibility of Foreign Securities to DTC's rules.²

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. DTC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most

¹ 15 U.S.C. 78s(b)(1).

² A Policy Statement is used by DTC to clarify and consolidate the Rules of DTC with respect to the subject of the Policy Statement. A Policy Statement is a part of the Rules of DTC. As such, pursuant to Rule 2 Section 1 of the DTC Rules and the Participants Agreement that participants enter into with DTC, a Policy Statement is binding on DTC participants.

significant aspects of such statements.³

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the Policy Statement is to set forth in a single place in an accessible manner the criteria and procedures for making the securities of foreign issuers (“Foreign Securities”) eligible for deposit and book-entry transfer through the facilities of DTC in accordance with the Securities Act of 1933 (“Securities Act”)⁴ and the rules and regulations of the Commission thereunder. For purposes of the Policy Statement, (1) the term “security” has the meaning provided in Section 2(a)(1) of the Securities Act,⁵ (2) the term “foreign issuer” has the meaning provided in Rule 405 of the Commission under the Securities Act (and includes both a “foreign government” and a “foreign private issuer” as defined in Rule 405)⁶ and (3) capitalized terms that are used but not otherwise defined in the Policy Statement have the meanings given to such terms in the Rules of DTC.

The Policy Statement covers both Foreign Securities deposited with DTC at the time that such Foreign Securities are first distributed (referred to as “new issues” in the DTC system) and Foreign Securities deposited with DTC subsequent to the time that such Foreign Securities are first distributed (referred to as “older issues” in the DTC system). The criteria and procedures for making new issues of Foreign Securities eligible for deposit and book-entry transfer through the facilities of DTC have previously been codified by DTC. The criteria and procedures for

³ The Commission has modified parts of these statements.

⁴ 15 U.S.C. 77 et seq.

⁵ 15 U.S.C. 77b(a)(1).

⁶ 17 CFR 230.405. The term foreign issuer means any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country.

making older issues of Foreign Securities eligible for deposit and book-entry transfer through the facilities of DTC have not previously been codified by DTC. Accordingly, what would be new in the Policy Statement are the criteria and procedures for making older issues of unregistered Foreign Securities DTC-eligible.⁷ These are generally securities that may be freely traded outside the U.S. over the counter or on foreign exchanges or traded in the U.S. over the counter market subject to the resale restrictions of the Securities Act.

The proposed rule change, as it relates to older issues of unregistered Foreign Securities, represents an extension, with no material change, in arrangements that now apply to new issues of unregistered Foreign Securities, including securities that may be resold without registration under the Securities Act pursuant to Regulation S or Rule 144A. The proposed rule change, by establishing the criteria and procedures for a wider but not fundamentally different range of unregistered Foreign Securities to settle at DTC would increase the transparency and reduce the risk and cost of transactions in these securities.

At the present time, purchases and sales of older issues of unregistered Foreign Securities by U.S. investors typically settle through foreign intermediaries and central securities depositories in multiple jurisdictions. By having these transactions settle at DTC, U.S. investors and intermediaries would be able to benefit from (1) DTC risk management controls approved by the Commission and the Board of Governors of the Federal Reserve System, (2) a more visible and less complicated settlement process and (3) greater control over settlement costs with fees determined by the user-representative board of directors of DTC.

In all cases and circumstances, participants of DTC would be responsible for determining

⁷ Registered securities, whether new issues or older issues, whether foreign or domestic, can always be made DTC-eligible.

that their deposit of older issues of unregistered Foreign Securities with DTC, as well as their transactions in such securities through the facilities of DTC, are in compliance with the Rules of DTC and the federal securities laws.

Categories of Foreign Securities Eligible for DTC Services

Under the Policy Statement, the following categories of Foreign Securities would be eligible for DTC book-entry delivery services as and to the extent set forth below:⁸

- (1) Foreign Securities that are registered under the Securities Act (“Registered Foreign Securities”) would be eligible for all DTC services.
- (2) Foreign Securities that are exempt from registration under the Securities Act pursuant to an exemption that does not involve any resale restrictions (“Exempt Foreign Securities”) would be eligible for all DTC services.
- (3) Foreign Securities that may be offered and sold without registration under the Securities Act pursuant to Regulation S (“Foreign Regulation S Securities”)⁹ would be eligible for all DTC services. This would include Category 1 securities, Category 2 securities and Category 3 securities under Regulation S.¹⁰

⁸ The categories of Foreign Regulation S Securities, Foreign Rule 144A Securities, Foreign Restricted Securities and Foreign Other Eligible Securities are not all mutually exclusive. For example, (i) Foreign Regulation S Securities may be resold to qualified institutional buyers (as defined in Rule 144A) pursuant to Rule 144A, (ii) Foreign Rule 144A Securities may be resold in offshore transactions (as defined in Regulation S) pursuant to Regulation S and (iii) Foreign Regulation S Securities and Foreign Rule 144A Securities that are restricted securities (as defined in Rule 144) may be resold pursuant to Rule 144.

⁹ 17 CFR 230.901 through 905.

¹⁰ Category 1 of the primary offering safe harbor of Regulation S includes the securities of foreign issuers for which there is no substantial US market in the subject securities, securities being offered by foreign (or domestic) issuers in overseas directed offerings, the securities of foreign governments and securities being offered by foreign issuers pursuant to employee benefit plans. Category 2 of the primary offering safe harbor of Regulation S includes the equity securities of reporting foreign issuers, the debt securities of foreign (or domestic) reporting

(4) Foreign Securities that may be resold without registration under the Securities Act pursuant to Rule 144A (“Foreign Rule 144A Securities”)¹¹ would be eligible for all DTC services. If such Foreign Rule 144A Securities are not investment grade securities (i.e., nonconvertible debt securities or nonconvertible preferred stock rated in one of the top four categories by a nationally recognized statistical rating agency), then to be eligible for DTC services such Foreign Rule 144A Securities would have to be securities designated for inclusion in a system of a self-regulatory organization approved by the Commission for the reporting of quotation and trade information on Rule 144A transactions (“SRO Rule 144A System”).¹²

issuers and the debt securities of nonreporting foreign issuers even if there is substantial U.S. market interest in the subject securities. Category 3 of the primary offering safe harbor of Regulation S includes the equity securities of non-reporting foreign issuers with substantial U.S. market interest in the subject securities. 17 CFR 230.903.

¹¹ 17 CFR 230.144A.

¹² For the requirement that securities other than investment grade securities be designated for inclusion in a Self Regulatory Organization (“SRO”) Rule 144A System approved by the Commission, see Securities Exchange Act Release No. 33327 (December 13, 1993), 58 FR 67878 (December 22, 1993) (File No. SR-DTC-90-06) (Order Approving a Proposed Rule Change by DTC Relating to the Eligibility of Rule 144A Securities at DTC).

The original SRO Rule 144A System approved by the Commission was the Private Offerings, Resales, and Trading through Automated Linkages (“PORTAL”) Market System operated by the National Association of Securities Dealers, Inc. (“NASD”). For a description of the PORTAL Market System and the relationship between the PORTAL Market System and DTC, see Securities Exchange Act Release Nos. 27956 (April 27, 1990), 55 FR 18781 (May 4, 1990) (File No. SR-NASD-88-23) (Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendments to Proposed Rule of NASD Relating to the Operation of the PORTAL Market) and 33326 (December 13, 1993), 58 FR 66388 (December 22, 1993) (File No. SR-NASD-91-5) (Order Approving a Proposed Rule Change Relating to the Operation of the PORTAL Market).

In 2001, the Commission approved an NASD proposed rule change to require PORTAL participants to submit trade reports of secondary market transactions in PORTAL equity securities through the NASD Automated Confirmation and Transaction Service (“ACT”) and PORTAL high-yield debt securities through the NASD Trade Reporting and Comparison Entry Service (“TRACE”) and to redefine the PORTAL Market System to include ACT and TRACE. Securities Exchange Act Release No. 44042 (March 6, 2001), 66 FR 14969 (March 13, 2001)

(5) Foreign Securities that may be resold without registration under the Securities Act pursuant to Rule 144 (“Foreign Restricted Securities”)¹³ would be eligible for all DTC services.

(6) Foreign Securities that may be resold without registration under the Securities Act pursuant to any other exemption (“Foreign Other Eligible Securities”) would be eligible for all DTC services. This shall include without limitation an exemption pursuant to Rule 801¹⁴ in connection with a rights offering or an exemption pursuant to Rule 802¹⁵ in connection with an exchange offer.

Although all the foregoing categories of Foreign Securities would be eligible for deposit and book-entry transfer through the facilities of DTC, DTC would have the right adopt associated procedures to determine in accordance with Rule 5, Section 1 of the DTC Rules, and its obligations as a registered clearing agency subject to regulation by the Commission whether any particular issue would be accepted for deposit and made eligible for some or all DTC services.

Responsibilities of Issuers and Participants

Issuers and participants would be responsible for determining that their deposit of Foreign Securities with DTC and their transactions in Foreign Securities through the facilities of DTC are in compliance with the Rules of DTC and the federal securities laws. In particular and

(File No. SR-NASD-99-66) (Order Approving Proposed Rule Change Relating to the Implementation of Mandatory Trade Reporting for PORTAL Securities). As a result, ACT and TRACE are each an SRO Rule 144A System for purposes of the DTC Rule 144A eligibility requirement.

¹³ 17 CFR 230.144.

¹⁴ 17 CFR 230.801.

without limitation, issuers and participants would be responsible not engage in any transactions in Foreign Securities, including any distribution of unregistered Foreign Securities through the facilities of DTC, in violation of the Securities Act and the rules and regulations of the Commission thereunder. These responsibilities of issuers and participants are based on the following:

(1) Issuers and participants depositing Foreign Securities with DTC and participants engaging in transactions in Foreign Securities through the facilities of DTC are subject to the Rules of DTC and the federal securities laws.

(2) Rule 2 Section 7 of the DTC Rules provides, “In connection with their use of the Corporation’s [DTC’s] services, Participants and Pledges must comply with all applicable laws, including all applicable laws relating to securities, taxation and money laundering.”

(3) Section 7(b) of the “Operational Arrangements (Necessary for an Issue to Become and Remain Eligible for DTC Services)” of DTC (“DTC Operational Arrangements”) which relate to book-entry only (“BEO”) issues being made eligible for DTC services provides:

Issuer recognizes that DTC does not in any way undertake to, and shall not have any responsibility to, monitor or ascertain the compliance of any transactions in the Securities with the following, as amended from time to time: (1) any exemptions from registration under the Securities Act of 1933; (2) the Investment Company Act of 1940; (3) the Employee Retirement Income Security Act of 1974; (4) the Internal Revenue Code of 1986; (5) any rules of any self-regulatory

¹⁵ 17 CFR 230.802.

organizations (as defined under the Securities Exchange Act of 1934); or (6) any other local, state, federal, or foreign laws or regulations thereunder.

This and other representations made by issuers to DTC pursuant to the DTC Operational Arrangements are mirrored in the Letter of Representations that DTC receives from issuers in connection with their deposits of BEO issues with DTC.

(4) In 1994, in an order clarifying certain language in the Rule 144A approval order, the Commission concurred in the position taken by DTC with respect to Rule 5 of the DTC Rules that “Rule 5 does not require DTC to determine whether securities, when deposited at DTC, may be transferred lawfully by book-entry in light of the Federal securities law.”¹⁶ The original Rule 144A order included the statement that Rule 5, Section 1 of DTC's Rule required DTC to determine whether in light of the Federal securities laws, particularly the provisions of Rules 144, 144A, and 145, the securities when deposited with DTC may be lawfully transferred by book-entry. DTC filed the rule change in order to clarify that DTC Rule 5 does not require DTC to determine whether securities deposited at DTC may be transferred lawfully pursuant to Federal securities laws. DTC subsequently amended Rule 5 to delete any implication that DTC was under any statutory or contractual obligation to determine whether securities deposited with DTC could be legally transferred by book-entry.¹⁷

¹⁶ Securities Exchange Act Release No. 33672 (February 23, 1994), 59 FR 10186 (March 3, 1994) (File No. SR-DTC-93-14) (Order Approving Proposed Rule Change Relating to a Clarification of Rule 5).

¹⁷ The position taken by DTC with respect to original Rule 5 order and the clarification to Rule 5 are in accord with Section 17A(b)(3)(A) of the Act, which provides that a clearing agency shall not be registered under Section 17A unless the Commission determines that “[s]uch clearing agency is so organized and has the capacity to . . . enforce (subject to any rule or order of the Commission pursuant to Section 17(d) or 19(g)(2) of this title) compliance by its

DTC Procedures

DTC implements a variety of measures designed to facilitate compliance by issuers and participants with their obligations to DTC and pursuant to the federal securities laws. These measures are set forth below with particular reference to the proposal for Foreign Securities.

With respect to new issues of Foreign Securities:

(1) For all Foreign Securities, DTC would require (a) from the Participant seeking DTC eligibility (e.g., the underwriter) an Eligibility Questionnaire that sets forth inter alia the basis on which the securities are eligible for deposit and book-entry transfer through the facilities of DTC and (b) from the issuer a Letter of Representations with representations that incorporate by reference substantially all of the standard representations set forth in the DTC Operational Arrangements.

(2) For Foreign Regulation S Securities, DTC would require from the issuer a rider to the Letter of Representations with inter alia additional representations relating to the securities being eligible for resale pursuant to Regulation S and having a CUSIP or CINS identification number different from the CUSIP or CINS identification number of any registered securities of the issuer of the same class.

(3) For Foreign Rule 144A Securities, DTC would require from the issuer a rider to the Letter of Representations with inter alia additional representations relating to the securities being eligible for resale pursuant to Rule 144A, having a CUSIP or CINS

participants with the rules of the clearing agency, and to carry out the purposes of this section.” 15 U.S.C. 78q-1(b)(3)(A).

Accordingly, a clearing agency is authorized and required to enforce against its participants the rules of the clearing agency and the provisions of Section 17A of the Exchange Act but is not authorized or required (because it does not have the jurisdiction or power) to enforce against its participants (or non-participant issuers or transfer agents) the provisions of the Securities Act and the rules and regulations of the Commission thereunder.

identification number different from the CUSIP or CINS identification number of any registered securities of the issuer of the same class and whether the securities are investment grade securities or securities designated for inclusion in an SRO Rule 144A System.

With respect to older issues of Foreign Securities:¹⁸

(1) DTC (a) would determine that any unregistered Foreign Securities deposited with DTC have a CUSIP or CINS identification number that is different from the CUSIP or CINS identification of any registered securities of the issuer of the same class and (b) would confirm that any Foreign Rule 144A Securities deposited with DTC are investment grade securities or securities designated for inclusion in an SRO Rule 144A System.

(2) DTC would require from any participant that wishes to deposit any unregistered Foreign Securities with DTC or engage in any transactions in unregistered Foreign Securities through the facilities of DTC a one-time blanket Letter of Representations (“Participant Foreign Securities BLOR”) with inter alia representations that such Participant (a) will not deposit any unregistered Foreign Securities with DTC unless such securities are eligible for resale without registration under the Securities Act and (b) will not engage in any transactions in Foreign Securities, including any distribution of unregistered Foreign Securities through the facilities of DTC, in violation of the Securities Act and the rules and regulations of the Commission thereunder.¹⁹

¹⁸ Foreign Securities that have historically been traded only on foreign securities exchanges and in foreign over-the-counter markets can be deposited as older issues and transferred by book-entry through the facilities of DTC, provided that they may legally be resold in the United States, i.e., they are registered under the Securities Act or they are eligible for resale in the United States without registration under the Securities Act.

¹⁹ A form of the proposed Participant Foreign Securities BLOR is attached as Exhibit 2 to the proposed rule change filed by DTC with the Commission.

DTC would systemically block any Participant that has not executed a Participant Foreign Securities BLOR from (a) depositing any unregistered Foreign Securities with DTC or (b) engaging in any transactions in unregistered Foreign Securities through the facilities of DTC.

Additional Documentation

Although the foregoing documentation for new issues and older issues would be provided by issuers or participants in connection with the deposit of Foreign Securities with DTC and/or as a condition to engaging in transactions in Foreign Securities through the facilities of DTC, DTC would have the right and could adopt associated procedures to determine in accordance with Rule 5 Section 1 of the DTC Rules and its obligations as a registered clearing agency subject to regulation by the Commission whether any other or additional documentation would be required.

Section 17A(a)(2)(A) of the Act directs the Commission to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of securities transactions and the establishment of linked or coordinated facilities for clearance and settlement. The deposit and book-entry transfer of Foreign Securities through the facilities of DTC in accordance with the criteria and procedures set forth in the proposed Policy Statement would (1) enable DTC to provide its participants with prompt and accurate clearance and settlement of their cross-border securities transactions, (2) enable DTC to enhance and extend its linkages with foreign depositories and exchanges and (3) enable DTC to support the cross-border initiatives of US broker-dealers, banks and exchanges.

(B) Self-Regulatory Organization's Statement on Burden on Competition

DTC does not believe that the proposed rule change would impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments relating to the proposed rule change have been solicited or received by DTC from members, participants or other persons. DTC will notify the Commission of any written comments it receives.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty five days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (a) by order approve the proposed rule change or
- (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-DTC-2007-04 on the subject line.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-DTC-2007-04. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications

relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. Copies of such filing also will be available for inspection and copying at the principal office of DTC. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-DTC-2007-04 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission by the Division of Market Regulation, pursuant to delegated authority.²⁰

Florence E. Harmon
Deputy Secretary

²⁰ 17 CFR 200.30-3(a)(12).