

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-56277; File No. SR-DTC-2007-04)

August 17, 2007

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

I. Introduction

On April 19, 2007, The Depository Trust Company (“DTC”) filed with the Securities and Exchange Commission (“Commission”) proposed rule change SR-DTC-2007-04 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”).¹ Notice of the proposal was published in the Federal Register on June 28, 2007.² One comment letter was received.³ For the reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Description

The proposed rule change adds a new Policy Statement on the Eligibility of Foreign Securities to DTC’s rules.⁴ The purpose of the Policy Statement is to set forth in a single place and 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

¹ 15 U.S.C. 78s(b)(1).

² Securities Exchange Act Release No. 55940 (June 21, 2007), 72 FR 35532.

³ Letter from Noland Cheng, Chairman, Operations Committee, Securities Industry and Financial Markets Association (July 17, 2007).

⁴ Policy Statements are used by DTC to clarify and consolidate the Rules of DTC with respect to the subject of a 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.

(“Securities Act”)⁵ 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,⁶ (2) the term “foreign issuer” has the meaning provided in Rule 405 under the Securities Act, which and includes both a “foreign government” and a “foreign private issuer” as defined in Rule 405,⁷ 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 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

⁵ 15 U.S.C. 77 et seq.

⁶ 15 U.S.C. 77b(a)(1).

⁷ 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.

Securities DTC-eligible.⁸ These older issues are generally securities that are freely tradable outside the U.S. over the counter or on foreign exchanges or are traded in the U.S. over the counter 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. By establishing the criteria and procedures for a wider but not fundamentally different range of unregistered Foreign Securities to be DTC-eligible, the proposed rule change, should 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, (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 that their deposit of older issues of unregistered Foreign Securities with DTC and that their transactions in such securities through the facilities of DTC, are in compliance with the Rules of DTC and the federal securities laws.

⁸ Registered securities, whether new issues or older issues, whether foreign or domestic, can always be made DTC-eligible.

Categories of Foreign Securities Eligible for DTC Services

Under the Policy Statement, the following categories of Foreign Securities will be eligible for DTC book-entry delivery services as and to the extent set forth below.⁹

(1) Foreign Securities that are registered under the Securities Act (“Registered Foreign Securities”) will 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”) will 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”)¹⁰ will be eligible for all DTC services. This includes Category 1 securities, Category 2 securities, and Category 3 securities under Regulation S.¹¹

⁹ 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.

¹⁰ 17 CFR 230.901 through 905.

¹¹ 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, 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 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.

(4) Foreign Securities that may be resold without registration under the Securities Act pursuant to Rule 144A (“Foreign Rule 144A Securities”)¹² will 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 will 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”).¹³

¹² 17 CFR 230.144A.

¹³ 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.

(5) Foreign Securities that may be resold without registration under the Securities Act pursuant to Rule 144 (“Foreign Restricted Securities”)¹⁴ will 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”) will be eligible for all DTC services. This shall include without limitation an exemption pursuant to Commission Rule 801¹⁵ in connection with a rights offering or an exemption pursuant to Commission Rule 802¹⁶ in connection with an exchange offer.

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

44042 (March 6, 2001), 66 FR 14969 (March 13, 2001) (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.

On July 31, 2007, the Commission approved a proposed rule change by The NASDAQ Stock Market LLC (“Nasdaq”) to reestablish a quotation and trading system, The PORTAL Market, for securities that are designated by Nasdaq as PORTAL securities. The system would allow PORTAL Participants to trade with one another in a closed system. Securities Exchange Act Release No. 56172, 72 FR 44196 (August 7, 2007) (File No. SR-NASDAQ-2006-065).

¹⁴ 17 CFR 230.144.

¹⁵ 17 CFR 230.801.

¹⁶ 17 CFR 230.802.

Responsibilities of Issuers and Participants

Issuers and participants will be responsible for determining that their deposit of Foreign Securities with DTC and that 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 without limitation, issuers and participants will be responsible not to 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 DTC's 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 DTC's "Operational Arrangements (Necessary for an Issue to Become and Remain Eligible for DTC Services)" ("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 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 DTC's 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."¹⁷ The original Rule 144A order included the statement that Rule 5, Section 1 of DTC's Rules required DTC to determine whether in light of the Federal securities laws, particularly the provisions of Rules 144, 144A, and 145, securities when deposited with DTC could 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.

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

¹⁷ 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).

securities laws. With respect to new issues of Foreign Securities, these measures include the following.

(1) For all Foreign Securities, DTC will 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 will 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 will 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 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, these measures include the following.¹⁸

(1) DTC (a) will 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 will 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 will 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 as a condition to engaging in transactions in Foreign Securities through the facilities of DTC, DTC will have the right to 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 will be required.

III. Comments

The Commission received one comment to the proposed rule change.²⁰ The comment letter was written on behalf of the Operations Committee of the Securities Industry and Financial Markets Association (“SIFMA”) and requests that the Commission approve the proposed rule change. SIFMA notes in its letter that the proposed rule change includes procedures, such as the Eligibility Questionnaire and the Blanket Letter of Representation, that are designed (1) to prevent DTC Participants from depositing unregistered Foreign Securities at DTC that are not eligible for resale under the Securities Act and (2) to prevent DTC Participants from using the facilities of DTC to engage in transactions in unregistered Foreign Securities that would violate the Securities

²⁰ Letter from Noland Cheng, Chairman, Operations Committee, Securities Industry and Financial Markets Association (July 17, 2007).

Act and the rules and regulations thereunder. SIFMA states that given these procedural controls, it believes that older issues of unregistered Foreign Securities pose no additional risk to DTC or to the national clearance and settlement system and that participants and the markets will benefit from making a wider range of unregistered Foreign Securities eligible for deposit and book-entry transfer at DTC.

IV. Discussion

Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions. The proposed rule change expands the kinds of Foreign Securities eligible for deposit and book-entry transfer at DTC to include not only new issues of Foreign Securities but also older issues of Foreign Securities such as securities that currently may be freely traded outside the U.S. over the counter or on foreign exchanges or traded in the U.S. in over the counter market subject to the resale restrictions of the Securities Act. The proposed rule change also consolidates DTC's procedures for making Foreign Securities DTC-eligible. By allowing DTC participants to consolidate their positions in Foreign Securities at DTC instead of using the services of several custodians, DTC participants should benefit from the use of DTC's efficient, safe, and cost-efficient operations. This should be particularly true in situations where one DTC participant is transferring Foreign Securities to another DTC participant. Accordingly, we find that the proposed rule change is designed to promote the prompt and accurate clearance and settlement of securities transactions.

While DTC states in the filing that issuers and participants will be responsible not to 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, DTC is adopting, as set forth in the Policy Statement, certain measures designed to facilitate compliance by issuers and participants with the securities laws. These measures, as outlined in Section III of this approval order, and appear to be well designed to reduce the potential for the misuse of DTC's systems and facilities, particularly given DTC's experience with newer issuers of Foreign Securities. However, we expect DTC to monitor the effectiveness of these measures and to modify or adopt additional procedures where necessary.

V. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder.²¹

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR-DTC-2007-04) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.²²

Florence E. Harmon
Deputy Secretary

²¹ In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

²² 17 CFR 200.30-3(a)(12).