

M A R S H A L S H I C H T M A N & A S S O C I A T E S , P . C .

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May 13, 2004

Securities and Exchange Commission
Public Reference Section
450 Fifth Street, N.W.
Washington, D.C., 20549-0609
rule-comments@sec.gov

ATTN: Secretary

RE: Release No. 34-47365; File No. SR-DTC-2003-02

To Whom It May Concern:

I am humbly submitting my comments on File No. SR-DTC-2003-02

- 1) Stopping companies from withdrawing from DTC does not eliminate the underlying problem. The real problem is the naked short selling, regardless of DTC admittance to this problem. This problem stems from improper procedure either at the DTC or non-compliance by unsavory market makers and/or B/Ds. This is the underlying problem. If the DTC, and at this point possibly the SEC, can eliminate or severely curtail this, companies will have no desire to withdraw from the DTC.
 - a. Possible ways to fix this problem would be to re-examine DTC procedures and implement stringent compliance verifications.
 - b. Implement harsh penalties for market intermediaries (e.g. B/Ds, market makers, etc.) such as a \$5,000.00 penalty per naked short per day, license suspension for repeat offenders and license revocation for recidivists.
- 2) The DTC will be hard pressed to defend its position on entitlement as a nominee. This is a bone of contention between myself and the parties I have spoken with at the DTC. However, I see it as the DTC has more to lose than to gain when this will go to trial. Please bear in mind that it will eventually go to trial because the DTC, in its current course of action, leaves the issuers very little alternatives. In the DTC's position as nominee, I believe, will be in a difficult position to dictate terms to beneficial holders and beneficial interests. Once the DTC's position gets called into question it will erode the DTC's leverage and bargaining power in the long term.
 - a. In the DTC's release (release and file number aforementioned), the DTC stated that the issuers have no legal or beneficial interest. I view this statement as knowingly inaccurate. This is DTC's position, not black-letter law as DTC tried to make it appear. I find the DTC posting their position as fact entirely misleading and very disconcerting that certain material was possibly backdated.
 - b. The issuers are responsible for making the issue DTC eligible. The DTC is in effect stating that once the issuers make the issue eligible, it is irrevocable. Since the issuers have the authority to make the issue eligible, the issuers ostensibly

have the same authority to remove the issue from the DTC using the same authoritative principle in maximizing share value and protecting their investors/market participants.

- i. Using those same principles of maximizing share value and protecting shareholders, the issuers may have a duty to their shareholders to protect them from the naked short phantom decline in share value.
 - ii. This is one of the only remedies to force the naked short sellers to cover.
- 3) The DTC's position on transfer agents is somewhat ill fated. The transfer agents are under a fiduciary obligation to the issuers and to the DTC. This puts any of the transfer agents actions as lose-lose. If the current proposal passes, the transfer agents will be effectively frozen, thus providing disintermediation for the market. This will cause endemic problems in the market place, endless administrative proceedings, and eventually cumulating in frequent and intensive litigation.
- a. A methodology study should be done to surmise a process which can be affected in a manner and method so as not to disenfranchise the issuers themselves.
 - i. Such study should include a review of the DTC policy to routinely deny providing a list of beneficial holders. Such lists will help indicate naked short selling activity.
- 4) Issuers entering DTC do so as a matter of convenience. Exiting the DTC ostensibly does not effect the salability or liquidity of the issue.
- 5) Lastly, we all acknowledge the SEC as an over-ridingly authoritative source to take instructions from. However, the DTC's current course of action is asking the SEC to rubber stamp a quick fix without anyone providing in-depth analysis, meaningful public comments or public hearings. This concurrence might be seen by some eyes as allowing a harmful and embarrassing loophole to survive and implicitly allowing and endorsing market participants to be burned. This possibility could get exceedingly ugly and induce the proverbial “dirt”-storm.

If you have any questions, comments or concerns, please feel free to contact me at your earliest possible convenience. Thank you for your time and kind attention.

Yours, etc.,

Marshal Shichtman, Esq. MBA