

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-71745; File No. SR-DTC-2013-11)

March 19, 2014

Self-Regulatory Organizations; Depository Trust Company; Notice of Filing Amendment Nos. 1 and 2 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a 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

On December 5, 2013, The Depository Trust Company (“DTC”) filed with the Securities and Exchange Commission (“Commission”) proposed rule change SR-DTC-2013-11 (“Proposed Rules”) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder.<sup>2</sup> The Proposed Rules were published in the Federal Register on December 24, 2013.<sup>3</sup> The Commission received nine comments from seven commenters to the Proposed Rules and two letters from DTC responding to those comments.<sup>4</sup> On February 10, 2014, DTC filed Amendment No. 1 to the Proposed Rules. On March 10, 2014, DTC filed Amendment No. 2 to the Proposed Rules.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Release No. 34-71132 (Dec. 18, 2013); 78 FR 77755 (Dec. 24, 2013).

<sup>4</sup> See Letters to Elizabeth M. Murphy, Secretary, Commission from: Suzanne H. Shatto dated December 20, 2013 (“Shatto Letter”); Simon Kogan dated December 22, 2013 (“Kogan Letter”); DTCC BigBake dated December 27, 2013 (“DTCC BigBake Letter I”) and March 14, 2014 (“DTCC BigBake Letter II”); Brenda Hamilton, Hamilton & Associates Law Group, PA (“Hamilton Letter”); Charles V. Rossi, Chairman, STA Board Advisory Committee, Securities Transfer Association dated January 14, 2014 (“STA Letter”); Louis A Brillemen, Louise A. Brilleman, P.C. dated January 14, 2014 (“Brilleman Letter”); Gary Emmanuel and Harvey Kesner, Sichenzia Ross Friedman Ference LLP dated January 14, 2014 (“Sichenzia Letter I”) and February 24, 2014 (“Sichenzia Letter II”); and Isaac Montal, Managing Director and Deputy General Counsel, DTCC dated February 10, 2014 (“DTC Letter I”) and March 3, 2014 (“DTC Letter II”).

The Commission is publishing this notice and order to solicit comments on Amendment Nos. 1 and 2 from interested persons and to institute proceedings under Section 19(b)(2)(B) of the Exchange Act<sup>5</sup> to determine whether to approve or disapprove the Proposed Rules. The institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved, nor does it mean that the Commission will ultimately disapprove the Proposed Rules. Rather, the Commission seeks and encourages interested persons to provide additional comment on the Proposed Rules to inform the Commission's analysis of whether to approve or disapprove the Proposed Rules.

I. Background

The Proposed Rules specify procedures available to issuers of securities deposited at DTC when DTC blocks or intends to block the deposit of additional securities of a particular issue ("Deposit Chill")<sup>6</sup> or prevents or intends to prevent deposits and restrict book-entry and related depository services of a particular issue ("Global Lock").

A. International Power

DTC filed the Proposed Rules in response to the Commission's opinion in *In the Matter of International Power Group, Ltd.* ("International Power").<sup>7</sup> In *International Power*, the Commission held that issuers were entitled to "fair procedures" under Section 17A(b)(3)(H) when a clearing agency restricts or denies them access to services.<sup>8</sup> In addition, the Commission stated that it

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<sup>5</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>6</sup> Securities subject to a Deposit Chill remain eligible for book-entry transfer at DTC.

<sup>7</sup> *Int'l Power Group, Ltd.*, Securities Exchange Act Rel. No. 66611 (Mar. 15, 2012), 2012 SEC LEXIS 844.

<sup>8</sup> *Int'l Power*, 2012 SEC LEXIS 844, at \*16. The Commission also held that the Commission has jurisdiction under Section 19(f) of the Exchange Act to review an

believes “DTC should 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.”<sup>9</sup> Those procedures must also comply with Section 17A(b)(5)(B) of the Exchange Act, which requires clearing agencies when prohibiting or limiting a person’s access to services, to (1) notify such person of the specific grounds for the prohibition or limitation, (2) give the person an opportunity to be heard upon the specific grounds for the prohibition or limitation, and (3) keep a record.<sup>10</sup>

However, the Commission also acknowledged a clearing agency’s need to act to avert “imminent harm.”<sup>11</sup> The Commission stated a clearing agency may justifiably impose a suspension of services in advance of providing the issuer with notice and an opportunity to be heard.<sup>12</sup> In such circumstances, a clearing agency’s procedures “should balance the identifiable need for emergency action with the issuer’s right to fair procedures” and any suspension could not be maintained “indefinitely without providing expedited fair process to the affected issuer.”<sup>13</sup>

#### B. DTC’s Role Under Section 17A of the Exchange Act

DTC is the nation’s central securities depository, registered as a clearing agency under Section 17A of the Exchange Act.<sup>14</sup> DTC performs services and maintains securities accounts

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issuer’s appeal of a suspension or limitation on access to a clearing agency’s services. The Commission remanded the case to DTC to provide fair procedures.

<sup>9</sup> *Int’l Power*, 2012 SEC LEXIS 844, at \*32.

<sup>10</sup> *Int’l Power*, 2012 SEC LEXIS 844, at \*24.

<sup>11</sup> *Int’l Power*, 2012 SEC LEXIS 844, at \*29.

<sup>12</sup> *Int’l Power*, 2012 SEC LEXIS 844, at \*29.

<sup>13</sup> *Int’l Power*, 2012 SEC LEXIS 844, at \*29.

<sup>14</sup> See Securities Exchange Act Release No. 20221 (Sept. 23, 1983), 48 Fed. Reg. 45167 (Oct. 3, 1983).

for its participants, primarily banks and broker dealers (“Participants”).<sup>15</sup> Participants may present a security<sup>16</sup> to be made eligible for DTC’s depository and book-entry services. If DTC accepts the security as eligible for those services and the security is deposited with DTC for credit to the securities account of a Participant, it becomes an “Eligible Security.”<sup>17</sup> Thereafter, other Participants may deposit that Eligible Security into their respective DTC accounts. Once the Eligible Security is credited to the account of one or more Participants, interests in that Eligible Security may be transferred among Participants by book-entry in accordance with the DTC Rules and Procedures.

As provided in the DTC Rules and Procedures, DTC processes the transfer of interests in Eligible Securities among DTC Participants by credits and debits to Participant accounts in accordance with the instructions of delivering and receiving Participants who are parties to the transaction. DTC Participants agree to be bound by DTC’s Rules and Procedures as a condition

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<sup>15</sup> See 15 U.S.C. 78c(a)(24).

<sup>16</sup> “Security” is defined in DTC’s rules as follows: The term “Security” has the meaning given to the term “financial asset” in Section 8-102 of the [Uniform Commercial Code of New York]. Any item credited to an Account (by the act of being credited to the Account) shall be deemed a Security under these Rules and shall be treated as a financial asset under Article 8 of the [Uniform Commercial Code of New York]. A Security may be an Eligible Security, a Deposited Security, a Pledged Security, a Segregated Security or an MMI Security, or some or all of them collectively, as the context may require. The term “Security” shall not include Preferred Stock. See DTC Rule 1.

<sup>17</sup> Eligible Security is defined in DTC’s rules as “a Security accepted by the Corporation, in its sole discretion, as an Eligible Security. The Corporation shall accept a Security as an Eligible Security only (a) upon a determination by the Corporation that it has the operational capability and can obtain information regarding the Security necessary to permit it to provide its services to Participants and Pledges when such Security is Deposited and (b) upon such inquiry, or based upon such criteria, as the Corporation may, in its sole discretion, determine from time to time. The timing of additions of such issues shall be on a nondiscriminatory basis consistent with the Corporation’s objective to provide the maximum practical degree of service in facilitating the prompt and orderly settlement of Securities transactions.” See DTC Rule 1 and DTC Rule 5, Section 1.

of membership.

To facilitate book-entry transfer and other services that DTC provides for its Participants with respect to Deposited Securities,<sup>18</sup> Eligible Securities are registered on the books of the issuer (typically, in a register maintained by a transfer agent) in DTC's nominee name, Cede & Co. DTC maintains Eligible Securities of an issue in fungible bulk so that each Participant with an interest in the security has a pro rata interest in DTC's entire inventory of that issue, but none of the securities on deposit is identifiable to or owned by any particular Participant.<sup>19</sup>

DTC's deposit and book-entry transfer services facilitate the operation of the nation's securities markets. By serving as registered holder of trillions of dollars of securities, DTC processes the enormous volume of daily securities transactions by the book-entry movement without the need to transfer physical certificates.

### C. DTC Eligibility Standards

DTC's Rules and Procedures authorize DTC to determine whether to accept a security as an Eligible Security and when an Eligible Security will cease to be such.<sup>20</sup> They also provide that DTC "may limit certain services to particular issues of Eligible Securities."<sup>21</sup> The standards for determining whether a security is an Eligible Security are as follows:<sup>22</sup>

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<sup>18</sup> Deposited Security is defined in DTC's rules as "an Eligible Security credited to the Account of a Participant by Deposit or Delivery. A Deposited Security shall cease to be such if it becomes a Pledged Security or is Withdrawn." See DTC Rule 1.

<sup>19</sup> See Securities Exchange Act Release No. 19678 (Apr. 15, 1983), 48 Fed. Reg. 17603, 17605, n.5 (Apr. 25, 1983) (describing fungible bulk); see also N.Y. UNIFORM COMMERCIAL CODE, § 8-503, OFF. CMT 1 ("... all entitlement holders have a pro rata interest in whatever positions in that financial asset the [financial] intermediary holds").

<sup>20</sup> See DTC Rule 5.

<sup>21</sup> See DTC Rule 6.

<sup>22</sup> See DTC's Operational Arrangements, Section I.A.2.

Generally, the issues that may be made eligible for DTC's book-entry delivery, settlement and depository services are those that have been issued in a transaction that: (i) has been registered with the Commission pursuant to the Securities Act of 1933 ("Securities Act"); (ii) was exempt from registration pursuant to a Securities Act exemption that does not involve (or, at the time of the request for eligibility no longer involves) transfer or ownership restrictions; or (iii) permits resale of the securities pursuant to Rule 144A or Regulation S and in all cases such securities otherwise meet DTC's eligibility criteria.

Thus, an essential element of DTC eligibility is that the securities are "freely tradeable" or, if restricted by Rule 144A<sup>23</sup> or Regulation S under the Securities Act, are processed through a separate program in which Participants acknowledge and agree to comply with the applicable restrictions.

In determining whether deposited securities satisfy DTC's eligibility requirements, DTC may require an issuer to provide an opinion from outside counsel in order "to substantiate the legal basis for eligibility."<sup>24</sup> DTC also reserves the right to require an opinion of counsel in support of eligibility requirements "to protect DTC and its Participants from risk."<sup>25</sup>

## II. Description of the Proposed Rules

### A. Proposed Rule 22(A): Deposit Chills

#### 1. Scope of Proposed Rule 22(A)

Proposed Rule 22(A) sets forth procedures available to issuers of Eligible Securities where DTC detects unusually large volumes of deposits of a low priced or thinly traded Eligible

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<sup>23</sup> 17 CFR 230.144A.

<sup>24</sup> The Operational Arrangements further specify that such counsel must be "an experienced securities practitioner, licensed to practice law in the relevant jurisdiction and in good standing in any bar to which such practitioner is admitted. See DTC Operational Arrangements Section I.B.2. Such counsel must be engaged in an independent private practice (i.e., not in-house counsel) and may not have a beneficial ownership interest in the security for which the opinion is being provided or be an officer, director or employee of the Issuer." See DTC Operational Arrangements Section I.A.1.

<sup>25</sup> Id.

Security and, as a result, determines to impose or intends to impose a Deposit Chill.<sup>26</sup> The procedures will also apply if DTC imposes or intends to impose a Deposit Chill pursuant to its obligations under the Securities Act of 1933 (“Securities Act”), the Bank Secrecy Act (“BSA”) or any rules, regulations, or guidance promulgated under the BSA, including rules or regulations that the Office of Foreign Asset Control promulgates.<sup>27</sup>

However, Proposed Rule 22(A) will not apply when DTC “impose[s] operational restrictions on deposits or other services in connection with ordinary course of business processing of Eligible Securities.”<sup>28</sup> One example of “ordinary course of business processing” is the processing of corporate actions, including name changes and stock splits. It will also not apply to other restrictions in DTC’s Procedures<sup>29</sup> that do not constitute a Deposit Chill for purposes of Proposed Rule 22(A).

## 2. Deposit Chill Notice

DTC will send notice of the Deposit Chill (“Deposit Chill Notice”) to an issuer:

- No later than twenty Business Days<sup>30</sup> prior to the imposition of the Deposit Chill or;
- No later than three Business Days after imposition of the Deposit Chill in the event DTC must first impose the Deposit Chill:

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<sup>26</sup> See Proposed Rule 22(A)(1).

<sup>27</sup> Proposed Rule 22(A)(3)(b)(iii).

<sup>28</sup> Proposed Rule 22(A)(3)(b)(2).

<sup>29</sup> “Procedures” means the “Procedures, service guides, and regulations of the Corporation adopted pursuant to Rule 27, as amended from time to time.” See DTC Rule 1. In its filing with the Commission, DTC proposed to amend this definition to include “operational arrangements.”

<sup>30</sup> “Business Days” means any day on which DTC is open for business. See DTC Rule 1.

- “in order to prevent imminent harm, injury or other such consequences to [DTC] or its Participants;” or
- if DTC “reasonably determines that such action is necessary to protect the prompt and accurate clearance and settlement of securities transactions through [DTC].”<sup>31</sup>

The Deposit Chill Notice will inform the issuer of the reasons for DTC’s actions, including the legal authority upon which DTC relies to impose the Deposit Chill.<sup>32</sup> It will also provide the date the Deposit Chill was imposed or the date it will be imposed, should the issuer fail to respond to the Deposit Chill Notice.<sup>33</sup>

### 3. Deposit Chill Response

If the issuer elects to contest the Deposit Chill, it may submit a response (“Deposit Chill Response”) in the form and containing the substance provided in the Deposit Chill Notice.<sup>34</sup> If the issuer demonstrates to DTC’s “reasonable satisfaction” that the issue complies with DTC’s eligibility requirements and the applicable Procedures,<sup>35</sup> the Deposit Chill will be lifted or will not be imposed. DTC must receive the Deposit Chill Response within twenty Business Days after the date of the Deposit Chill Notice. However, DTC may extend this deadline for up to an additional twenty Business Days if the issuer establishes “good cause.”<sup>36</sup>

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<sup>31</sup> Proposed Rule 22(A)(2).

<sup>32</sup> Proposed Rule 22(A)(2)(a)(i).

<sup>33</sup> Id.

<sup>34</sup> Proposed Rule 22(A)(2)(a)(ii).

<sup>35</sup> See DTC Rule 5.

<sup>36</sup> Proposed Rule 22(A)(2)(a)(iv).



The Deposit Chill Response must include a legal opinion (“Legal Opinion”) from “an independent securities counsel retained by the issuer and reasonably acceptable” to DTC.<sup>37</sup> The Legal Opinion must establish that the security at issue meets DTC’s eligibility requirements by showing either that the securities (i) are not restricted securities under SEC Rule 144(a)(3),<sup>38</sup> or (ii) are exempt from any restrictions on transferability under the Securities Act.<sup>39</sup> The Legal Opinion must be satisfactory to DTC, but DTC will not “unreasonably withhold its acceptance” if the Legal Opinion “includes the material contents of the Template.”<sup>40</sup>

#### 4. Request for Additional Information

Upon receiving the Deposit Chill Response, DTC may request additional information from the issuer (“Additional Information Request”). DTC will set a time frame for the issuer’s response to the Additional Information Request (“Additional Information Response”), but in no case will it be less than ten Business Days from the date of the Additional Information Request.

#### 5. Deposit Chill Decision

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<sup>37</sup> Proposed Rule 22(A)(2)(a)(iii). In its filing with the Commission, DTC stated that in determining whether counsel is acceptable for this purpose “DTC refers to the relevant provisions set forth in the Operational Arrangements.” Those provisions provide that counsel must be “an experienced securities practitioner, licensed to practice law in the relevant jurisdiction and in good standing in any bar to which such practitioner is admitted. Such counsel must be engaged in an independent private practice (i.e. not in-house counsel) and may not have a beneficial ownership interest in the security for which the opinion is being provided or be an officer, director or employee of the Issuer.” See Operational Arrangements, Section I.A.1. A template legal opinion (“Template”) will be included with the Deposit Chill Notice.

<sup>38</sup> 17 CFR 230.144(a)(3).

<sup>39</sup> The eligibility requirements are set forth in DTC Rule 5 and Section 1 of DTC’s Operational Arrangements.

<sup>40</sup> Proposed Rule 22(A)(2)(b).

If an issuer submits a Deposit Chill Response, DTC will provide the issuer with a written decision (“Deposit Chill Decision”). An officer of DTC who did not have a role in the decision to impose the Deposit Chill (“Officer”) will make the Deposit Chill Decision.<sup>41</sup>

*Timing of Deposit Chill Decision*

If a Deposit Chill was imposed prior to the issuance of a Deposit Chill Notice, the Deposit Chill Decision will be provided within ten Business Days after receipt of the Deposit Chill Response or the Additional Information Response, if applicable. If a Deposit Chill was not imposed prior to the issuance of a Deposit Chill Notice, the Deposit Chill Decision will be provided within twenty Business Days after receipt of the Deposit Chill Response or the Additional Information Response, if applicable.

*Effect of Deposit Chill Decision*

The Deposit Chill Decision will result in DTC either: (i) not imposing or releasing a Deposit Chill; or (ii) imposing a Global Lock on the security. DTC will not impose a Deposit Chill or will release a Deposit Chill already in place “if the Officer reasonably determines that the Deposit Chill Response has established that the securities subject thereof satisfy [DTC’s] eligibility requirements” particularly that they satisfy DTC’s eligibility requirements as set forth in Rule 5 and Section 1 of DTC Operational Arrangements.

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<sup>41</sup> “Officer” of DTC is defined as “an Executive Chairman of the Board and a Chief Executive Officer, each of whom shall be elected by the Board of Directors from among its own number, a Chief Operating Officer, one or more Managing Directors, a Secretary, a Treasurer, a Comptroller and an Auditor, and may include one or more Assistant Secretaries and one or more Assistant Treasurers. The officers shall be elected by the Board at the first meeting of the Board after the annual meeting of the shareholders in each year. The Board may elect or appoint other officers (including, but not limited to, a Vice Chairman of the Board, a President and one or more Vice Presidents), agents and employees, who shall have such authority and perform such duties as may be prescribed by the Board. . . .” See DTC By-Laws Section 3.1.

DTC will intend to impose a Global Lock if the Officer reasonably determines that the Deposit Chill Response does not satisfy the substantive requirements in the Deposit Chill Notice. DTC will also impose a Global Lock if the issuer does not submit a Deposit Chill Response within the applicable time period.

Prior to imposition of the Global Lock in this circumstance, an issuer has ten Business Days to submit a supplemental Deposit Chill Response (“Supplemental Deposit Chill Response”).<sup>42</sup> The issuer is limited in the Supplemental Deposit Chill Response to demonstrating that (1) it did submit the Deposit Chill Response or Additional Information Response, if applicable, within the required time frame, or (2) DTC made a clerical mistake or a mistake arising from an oversight or omission in reviewing the Deposit Chill Response [or Additional Information Response, if applicable].<sup>43</sup> If an issuer submits a Supplemental Deposit Chill Response, the Officer will provide the issuer with a written decision (“Supplemental Deposit Chill Response Decision”) within ten Business Days of its submission.

#### 6. The Record

The record for purposes of any appeal to the Commission will be comprised of:

- The Deposit Chill Notice, the Deposit Chill Response, the Deposit Chill Decision, the Supplemental Deposit Chill Response, the Supplemental Deposit Chill Response Decision, the Additional Information Request, and the Additional Information Response;
- All documents submitted in connection with the items listed immediately above and;

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<sup>42</sup> Proposed Rule 22(A)(c)(iii).

<sup>43</sup> Proposed Rule 22(A)(c)(iii).

- Any written communications created pursuant to Proposed Rule 22(A)(3)(b)(iv), as described below.<sup>44</sup>

#### 7. Waiver of Right to Make Submission

If an issuer does not comply with any deadline set pursuant to Rule 22(A) or in a Deposit Chill Notice, it waives its right to make the submission unless DTC expressly waives or extends in writing the period for submission.<sup>45</sup>

#### 8. Reservation of Authority

Once DTC has imposed a Deposit Chill, Proposed Rule 22(A) does not prevent it from lifting or modifying the Deposit Chill “to prevent imminent harm, injury or other such consequences to [DTC] or its Participants or where [DTC] otherwise reasonably determines that such action is necessary to protect the prompt and accurate clearance and settlement of securities transactions through DTC.”<sup>46</sup> In addition, for those same reasons, DTC may impose a Deposit Chill after providing an issuer with a Deposit Chill Notice or Additional Information Request but before it has received a Deposit Chill Response or Additional Information Response without waiting for the applicable deadline to arrive.<sup>47</sup> In such circumstances, after the Deposit Chill is imposed, the procedures in Proposed Rule 22(A)(2)(c) will apply. For example, DTC will issue the Deposit Chill Decision with ten Business Days after receiving the Deposit Chill Response or the Additional Information Response, if applicable.<sup>48</sup>

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<sup>44</sup> Proposed Rule 22(A)(b)(3)(iv).

<sup>45</sup> Proposed Rule 22(A)(2)(a).

<sup>46</sup> Proposed Rule 22(A)(3)(b)(i)(A).

<sup>47</sup> Proposed Rule 22(A)(3)(b)(i)(B).

<sup>48</sup> Proposed Rule 22(A)(3)(c).

Proposed Rule 22(A) also does not prohibit DTC from communicating with an issuer, its transfer agent, or other authorized representative known to DTC in connection with a Deposit Chill.<sup>49</sup> As noted above, any such substantive communications will be in writing and part of the record for purposes of any appeal to the Commission.

9. Method of Delivery of Deposit Chill Notice

DTC will send the issuer any Deposit Chill Notice via overnight courier to the issuer's address in its regulatory filings where it is incorporated or otherwise organized. If DTC cannot locate the issuer with reasonable diligence, it will send it the issuer's designee for service of process or the Secretary of State or any state securities agency of the State where the issuer is incorporated or otherwise organized. If the issuer is not incorporated or otherwise organized in any state, DTC will send them to any similar agent of the jurisdiction where the issuer is incorporated or otherwise organized.

B. Proposed Rule 22(B)

1. Scope of Proposed Rule 22(B)

The procedures in Proposed Rule 22(B) apply to issuers of Eligible Securities where DTC imposes or intends to impose a Global Lock<sup>50</sup> in conjunction with either of the following:

- Judicial Action or Administrative Proceeding: DTC becomes aware that the Commission or other federal or state law enforcement or regulatory authority has commenced a judicial action or administrative proceeding ("Proceeding") alleging

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<sup>49</sup> Proposed Rule 22(A)(3)(b)(iv).

<sup>50</sup> Proposed Rule 22(B)(1).

that “Defendants”<sup>51</sup> sold Eligible Securities in violation of Section 5 of the Securities Act or other applicable law.<sup>52</sup>

- Deposit Chill: DTC imposes a Global Lock when an issuer does not satisfy the requirements of lifting or not imposing a Deposit Chill in Rule 22(A)(2)(c)(ii) and (iii).<sup>53</sup>

## 2. Global Lock Notice

DTC will send notice of the Global Lock (“Global Lock Notice”) to an issuer:

- no later than twenty Business Days prior to the imposition of the Global Lock<sup>54</sup> or;
- no later than three Business Days after imposition of the Global Lock in the event DTC must first impose the Global Lock:
  - “in order to prevent imminent harm, injury or other such consequences to [DTC] or its Participants;” or
  - if DTC “reasonably determines that such action is necessary to protect the prompt and accurate clearance and settlement of securities transactions through [DTC].”<sup>55</sup>

The Global Lock Notice will inform the issuer of the reasons for DTC’s actions, including the legal authority upon which DTC relies.<sup>56</sup> It will also provide the date the Global

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<sup>51</sup> Proposed Rule 22(B) defines “Defendants” as a defendant, defendants, and other subjects of the action.

<sup>52</sup> Proposed Rule 22(B)(1)(a).

<sup>53</sup> Proposed Rule 22(B)(1)(b).

<sup>54</sup> Proposed Rule 22(B)(2).

<sup>55</sup> Proposed Rule 22(B)(2).

Lock was imposed or the date it will be imposed should the issuer fail to respond to the Global Lock Notice.<sup>57</sup> With respect to the issuer’s response, the Global Lock Notice will set forth the following:<sup>58</sup>

### 3. Global Lock Response

If the issuer elects to contest the Global Lock, it may submit a response (“Global Lock Response”) in the form and containing the substance provided in the Global Lock Notice. If the Global Lock Notice is based on a Proceeding as described in Proposed Rule 22(B)(1)(a), it will contain notice that a Global Lock will not be imposed, or, if already imposed, will be released if the issuer demonstrates either (1) that the Eligible Securities were not the intended subject of the Proceeding, or (2) that the Proceeding was withdrawn or dismissed on the merits with prejudice or otherwise resolved in a final, non-appealable judgment in favor of the Defendants.

DTC must receive the Global Lock Response with twenty Business Days after the date of the Global Lock Notice. However, DTC may extend this deadline for up to an additional twenty Business Days if the issuer establishes “good cause.”

### 4. Global Lock Decision

If an issuer submits a Global Lock Response, DTC will provide the issuer with a written decision (“Global Lock Decision”).<sup>59</sup>

#### Timing of Global Lock Decision

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<sup>56</sup> Proposed Rule 22(B)(2)(a)(i).

<sup>57</sup> Id.

<sup>58</sup> Also included with the Global Lock Notice will be a copy of Proposed Rule 22(B). See Proposed Rule 22(B)(2)(a)(iv).

<sup>59</sup> Proposed Rule 22(B)(c).

If a Global Lock was imposed prior to the issuance of a Global Lock Notice, the Global Lock Decision will be provided within ten Business Days after receipt of the Global Lock Response. If a Global Lock was not imposed prior to the issuance of a Global Lock Notice, the Global Lock Decision will be provided within twenty Business Days after receipt of the Global Lock Response.

*Effect of Global Lock Decision*

The Global Lock Decision will result in DTC either: (i) not imposing or releasing a Global Lock; or (ii) imposing or not releasing a Global Lock on the security. DTC will not impose a Global Lock, or will release a Global Lock already in place, if it reasonably determines that the Global Lock Response satisfies the requirements set forth in the Global Lock Notice.<sup>60</sup> If DTC reasonably determines that the Global Lock Response does not satisfy those requirements, it will impose or not release the Global Lock, as applicable.

5. Release of Global Lock Stemming from a Proceeding

Proposed Rule 22(B)(3) provides for the release of Global Locks imposed pursuant to a Proceeding as set forth in Proposed Rule 22(B)(1)(a). However, if the safe harbor under Securities Act Rule 144 is not available to the issuer pursuant to Securities Act Rule 144(i),<sup>61</sup> the issuer is not eligible for relief under this provision.<sup>62</sup> For those issuers, the Global Lock will remain in place until it complies with the requirements of Securities Act Rule 144(i)(2).<sup>63</sup>

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<sup>60</sup> Proposed Rule 22(B)(2)(c).

<sup>61</sup> See 17 CFR 230.144(i).

<sup>62</sup> Proposed Rule 22(B)(3).

<sup>63</sup> Id.



For all other issuers, the length of the Global Lock will depend in the first instance on whether the issuer is subject to the reporting requirements of Sections 13(a) and 15(d) of the Exchange Act. If the issuer is subject to such requirements, the Global Lock will be lifted six months after the “Disposition.”<sup>64</sup> If the issuer is not subject to the reporting requirements, the Global Lock will be lifted one year after either the entry of a judicial order or judgment or, if the Commission brought an administrative proceeding, the Disposition.<sup>65</sup>

Under Section 3 of Proposed Rule 22(B), an issuer may be required to submit a Legal Opinion and/or other evidence or documentation as DTC may reasonably require.<sup>66</sup>

6. Release of a Global Lock Stemming from a Deposit Chill under Proposed Rule 22(A)(2)(c)

Section 4 of Proposed Rule 22(B) provides for the release of Global Locks imposed when an issuer fails to satisfy the requirements for lifting a Deposit Chill in Sections 2(c)(ii) and (iii) of Proposed Rule 22(A). Like Section 3 of Proposed Rule 22(B), the length of the Global Lock will depend on whether the issuer is subject to the reporting requirements under Section 13 or Section 15(d) under the Exchange Act. If the issuer is such a reporting company, the Global Lock will be lifted six months after its imposition.<sup>67</sup> If the issuer is not such a reporting

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<sup>64</sup> Proposed Rule 22(B)(3)(b). Proposed Rule 22(b)(3)(a)(ii) defines “disposition” as “a final order of the Commission pursuant to Rule 360(d)(2) or Rule 411(a) of the Commission’s Rules of Practice that disposes of the claims against those Defendants allegedly responsible for the violations of Section 5 of the Securities Act relating to the Eligible Securities.

<sup>65</sup> Proposed Rule 22(B)(2)(a)(i) and (ii).

<sup>66</sup> Proposed Rule 22(B)(3)(c). As with a Legal Opinion regarding a Deposit Chill Notice, any Legal Opinion an issuer submits regarding a Global Local Notice must be in a form and substance satisfactory to DTC and be from an independent securities counsel reasonably acceptable to DTC. Id.

<sup>67</sup> Proposed Rule 22(B)(4).

company, the Global Lock will be lifted one year after its imposition.<sup>68</sup> As in Section 3 of Proposed Rule 22(B), a Global Lock will remain in place for those issuers for which the safe harbor under Securities Act Rule 144 would be unavailable pursuant to Rule 144(i) until the issuer complies with the requirements of Securities Act Rule 144(i)(2).<sup>69</sup>

#### 7. Record

The record for purposes of any appeal to the Commission consists of the Global Lock Notice, the Global Lock Response, and the Global Lock Decision.<sup>70</sup>

#### 8. Waiver of Right to Make Submission

If an issuer does not comply with any deadline set pursuant to Rule 22(B) or in a Global Lock Notice, it waives its right to make the submission unless DTS expressly waives or extends in writing the period for submission.<sup>71</sup>

#### 9. Reservation of Authority

Once DTC has imposed a Global Lock, Proposed Rule 22(B) does not prevent it from lifting or modifying the Global Lock “to prevent imminent harm, injury or other such consequences to [DTC] or its Participants or where [DTC] otherwise reasonably determines that such action is necessary to protect the prompt and accurate clearance and settlement of securities transactions through [DTC].”<sup>72</sup> In addition, for those same reasons, DTC may impose a Global Lock after providing an issuer with a Global Lock Notice but before it has received a Global

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<sup>68</sup> Id.

<sup>69</sup> Id.

<sup>70</sup> Proposed Rule 22(B)(2)(d).

<sup>71</sup> Proposed Rule 22(B)(5)(a).

<sup>72</sup> Proposed Rule 22(B)(5)(b)(i)(A).

Lock Response before the applicable deadline.<sup>73</sup> In such circumstances, after the Global Lock is imposed, the procedures in Section 2(c) of Proposed Rule 22(B) will apply. For example, DTC will issue the Global Lock Decision with ten Business Days after receiving the Global Lock Response.<sup>74</sup>

Proposed Rule 22(B) also does not prohibit DTC from communicating with an issuer, its transfer agent or other authorized representative known to DTC in connection with a Global Lock.<sup>75</sup> As noted above, any such substantive communications will be in writing and part of the record for purposes of any appeal to the Commission.

In addition, nothing in Proposed Rule 22(B) displaces any legal or regulatory requirements that DTC is subject to under applicable law, rule or regulation.<sup>76</sup> If DTC imposes a Global Lock for reasons other than those described in Proposed Rule 22(B), it will, however, apply the procedures set forth in Proposed Rule 22(B).<sup>77</sup>

#### 10. Method of Delivery of Global Lock Notice

DTC will send the issuer any Global Lock Notice via overnight courier to the issuer's address in its regulatory filings where it is incorporated or otherwise organized.<sup>78</sup> If DTC cannot locate the issuer with reasonable diligence, it will send them to the issuer's designee for service of process or the Secretary of State or any state securities agency of the State where the issuer is

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<sup>73</sup> Proposed Rule 22(A)(5)(b)(i)(B).

<sup>74</sup> Proposed Rule 22(B)(5)(c).

<sup>75</sup> Proposed Rule 22(B)(5)(b)(iv).

<sup>76</sup> Proposed Rule 22(B)(5)(b)(iii).

<sup>77</sup> Id.

<sup>78</sup> Proposed Rule 22(B)(5)(c).

incorporated or otherwise organized.<sup>79</sup> If the issuer is not incorporated or otherwise organized in any state, DTC will send them to any similar agent of the jurisdiction where the issuer is incorporated or otherwise organized.<sup>80</sup>

### III. Summary of Comments and DTC’s Responses

The Commission received nine comment letters from seven commenters on the Proposed Rules. DTC submitted two letters responding to comments. The summary of comments and DTC’s responses are organized into three categories: (i) notice to issuers, (ii) opportunity to be heard, and (iii) fair procedures.<sup>81</sup>

#### A. Notice to Issuers

##### 1. Comments Regarding Meaning of “Imminent Harm”

One commenter believes that DTC’s ability to impose a Deposit Chill or Global Lock “to prevent imminent harm, injury or other such consequences to [DTC] or its Participants, or where [DTC] otherwise reasonably determines that such action is necessary to protect the prompt and

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<sup>79</sup> Id.

<sup>80</sup> Id.

<sup>81</sup> Two commenters argued about that the scope of the Proposed Rules should be broader. Both of these commenters interpret Proposed Rule 22(A) to apply only when DTC imposes a Deposit Chill upon detecting “unusually large volumes of deposits of a low priced or thinly traded Eligible Security.” See STA Letter at 3-4; Sichenzia Letter I at 3. One of these commenters interprets Proposed Rule 22(B) to apply only when DTC becomes aware of a judicial or administrative proceeding or when an issuer has failed to meet the threshold for lifting a Deposit Chill. See Sichenzia Letter at 3. DTC responded that the Proposed Rules are broader than the commenters’ interpretation. See DTC Letter I at 13-14 (citing Proposed Rule 22(A)(3)(b)(iii) and Proposed Rule 22(B)(5)(b)(iii)).

One commenter believes the Proposed Rules should apply to other persons using DTC’s services, including transfer agents. See STA Letter at 7-8.

accurate clearance and settlement of securities transactions through [DTC]” is overly broad, ripe for abuse, and has the potential to render the advance notice procedure meaningless.<sup>82</sup>

Commenters also question what constitutes “imminent harm” and requests that DTC clarify the term.<sup>83</sup> One commenter believes DTC should be required to clearly outline the minimum showing of imminent harm that would be needed to justify the imposition of a restriction prior to providing the issuer with notice.<sup>84</sup> This commenter requests that DTC develop procedures for an expedited proceeding that should mirror FINRA Rule 9552.<sup>85</sup> One commenter does not believe that Section 17A authorizes DTC to restrict an issuer’s access to its facilities without prior notice.<sup>86</sup>

One commenter does not believe that the Proposed Rules require DTC to articulate what the “imminent harm” is in the Deposit Chill Notice, but rather only provide notice of the restriction and the reasons for the restriction. The commenter recommends that DTC be required to articulate the potential risks and who faces those risks.<sup>87</sup>

DTC responds that it “has provided meaningful standards to justify imposition of restrictions in those cases where prior notice is not feasible.”<sup>88</sup> It cites to International Power where the Commission stated that DTC may impose restrictions prior to providing notice “[i]f

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<sup>82</sup> See Sichenzia Letter I at 4.

<sup>83</sup> See Sichenzia Letter I at 4; Kogan Letter at 3.

<sup>84</sup> See Kogan Letter at 3.

<sup>85</sup> See Kogan Letter at 3.

<sup>86</sup> See Kogan Letter at 2.

<sup>87</sup> See Kogan Letter at 3.

<sup>88</sup> See DTC Letter I at 8.

DTC believes that circumstances exist that justify imposing an 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.” The Commission further stated that DTC may act to avoid imminent harm, but it must then provide “expedited fair process to the affected issuer.”<sup>89</sup>

DTC explains that “[w]hen 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.”<sup>90</sup> It also believes that Rule 22(A) provides issuers with expedited fair process. Based on its experience using the procedures in the Proposed Rule Change over the past months, DTC notes that in the “majority of cases” it has provided notice to issuers prior to imposing a Deposit Chill.<sup>91</sup>

With respect to Global Locks, DTC believes it is able to institute them as soon as possible once the Commission alleges that the proffered exemption and all other possible exemptions are not applicable.<sup>92</sup> As with Deposit Chills, over the past months DTC has provided notice to issuers prior to imposing a Global Lock in a majority of cases.<sup>93</sup>

## 2. Comments Regarding the Deposit Chill Notice

One commenter believes that in order for issuers to have the opportunity to fully understand and respond to the issues raised in the Deposit Chill Notice, DTC must provide in the

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<sup>89</sup> *Int’l Power*, 2012 SEC LEXIS 844, at \*29.

<sup>90</sup> See DTC Letter I at 9.

<sup>91</sup> See DTC Letter I at 9.

<sup>92</sup> See DTC Letter I at 9.

<sup>93</sup> See DTC Letter I at 9.

Deposit Chill Notice the reasons for the Deposit Chill or Global Lock in light of DTC's Eligibility Requirements.<sup>94</sup> DTC responds that the Proposed Rule change requires the Deposit Chill Notice and the Global Lock Notice to contain the reasons for the service restriction and provide the required form of response.<sup>95</sup>

One commenter believes that the named transfer agent of an issuer should also receive the Deposit Chill Notice and the Global Lock Notice. This commenter states that providing notice to the transfer agent would allow it to protect the interests of other registered shareholders of the issuer, as well as its own interests.<sup>96</sup> Another commenter does not believe that notice to a transfer agent is reasonably calculated to provide notice to the issuer, and instead suggests notice be given to the registered agent for service of process or the Secretary of State in the state of incorporation.<sup>97</sup>

One commenter also believes that DTC should give contemporaneous notice to the Commission. It believes this is necessary in order for the issuer to be able to seek a "stay of the restriction."<sup>98</sup> DTC responds that it does not need to replicate in its rules the Commission's

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<sup>94</sup> See STA Letter at 4.

<sup>95</sup> See DTC Letter I at 12.

<sup>96</sup> See STA Letter at 6. This commenter stated that the Commission has increasingly sought to impose obligations on transfer agents in this area and has expressed that transfer agents may face liability under Section 5 of the Securities Act in some circumstances.

<sup>97</sup> See Kogan Letter at 4.

<sup>98</sup> See Kogan Letter at 3.

Rules of Practice.<sup>99</sup> Another commenter believes that DTC should be required to notify law enforcement if it notices “a pattern by depositors.”<sup>100</sup>

B. Opportunity to be Heard

1. Comments Requesting an Opportunity for an In-Person Hearing and Internal Appeal

Three commenters believe that Section 17A of the Exchange Act requires DTC to provide affected issuers the opportunity to request a hearing to appeal the decision to institute a Deposit Chill or Global Lock within DTC.<sup>101</sup> Commenters cite to other SRO rules that afford affected parties the opportunity for a hearing in similar contexts, specifically, FINRA Rule 6490 and NASDAQ Rule 5815.<sup>102</sup>

Commenters also note that DTC Rule 22 permits issuers to contest any decision to deny their status as an Eligible Security by filing a request for a hearing. Such a hearing takes place before three members of a panel selected by the Chairman of the Board of the Depository Trust and Clearing Corporation, the parent company of DTC, from a pool of persons employed by or partners of Participants.<sup>103</sup> One commenter notes that in the event that an issuer is subject to a Deposit Chill or a Global Lock, the effect of that decision by DTC is the same as though it has been denied status as an Eligible Security. As a result, this commenter argues that issuers should

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<sup>99</sup> See DTC Letter I at 12 (citing Rule 420(b) of the Commission’s Rule of Practice, 17 CFR 201.420).

<sup>100</sup> See Shatto Letter at 1.

<sup>101</sup> See STA Letter at 5; Sichenzia Letter I at 2; Sichenzia Letter II at 2; Kogan Letter at 4-5. One of these commenters requests “a hearing or an internal appeals process that is meaningful.” See Sichenzia Letter II at 2.

<sup>102</sup> See STA Letter at 5; Sichenzia Letter II at 2.

<sup>103</sup> See STA Letter at 5; Sichenzia Letter I at 3.



be afforded a hearing, just as they are under Rule 22.<sup>104</sup>

Another commenter similarly believes issuers must be afforded a hearing like those provided under DTC Rule 22.<sup>105</sup> This commenter believes the Commission thought the issuer in International Power should have been given a hearing, although the commenter notes the Commission never held that DTC is required to provide a hearing.<sup>106</sup> The commenter points to the following statement from the Commission’s opinion: “DTC has not articulated an adequate rationale for providing a hearing to an issuer for whose securities DTC will provide no service, but not to an issuer whose securities are denied those clearance and settlement services that go to the heart of DTC’s role as a clearing agency.”<sup>107</sup> The commenter also believes that the Commission’s references to FINRA Rule 9558, which requires a hearing, supports its position that the Commission intended for DTC to provide issuers a hearing.<sup>108</sup>

In response to these comments, DTC states that while Section 17A(b)(3)(H) requires DTC to provide persons with fair procedures when restricting services and Section 17A(b)(5)(B) requires that fair procedures include notice and an opportunity to be heard, nothing in 17A requires DTC to provide issuers with an in-person testimonial hearing.<sup>109</sup> DTC also provides

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<sup>104</sup> See STA Letter at 5. Commenters recommend allowing issuers to use the hearing process outlined in Rule 22. See STA Letter at 5; Sichenzia Letter I at 3. One of these commenters also recommends Rule 22 be amended to provide that the three person panels that hear appeals from decisions made by DTC be comprised of one person that is employed by, or a partner of, a registered transfer agent. See STA Letter at 5-6.

<sup>105</sup> See Sichenzia Letter II at 2.

<sup>106</sup> See Sichenzia Letter II at 2.

<sup>107</sup> See Sichenzia Letter II at 2 (citing *Int’l Power*, 2012 SEC LEXIS 844, at \*20).

<sup>108</sup> See Sichenzia Letter II at 2.

<sup>109</sup> See DTC Letter I at 2-3.

that the Commission’s opinion in International Power did not specify the procedures DTC should apply, but rather stated that DTC should “adopt procedures that accord with the fairness requirements of Section 17A(b)(3)(H), which may be applied uniformly in any future such cases.”<sup>110</sup> DTC also notes that even though the Commission refers to DTC Rule 22 in International Power, it did not state that DTC should apply those procedures when instituting Deposit Chills or Global Locks.<sup>111</sup>

With respect to the procedures in FINRA Rule 6490 and NASDAQ Rule 5815, DTC responds that it has a different role in the securities industry than FINRA and NASDAQ.<sup>112</sup> It notes that FINRA and NASDAQ have disciplinary and adjudicatory mandates “to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade. . . .”<sup>113</sup> DTC provides that it “does not perform a policing function to root out fraudulent and manipulative conduct in violation of the securities laws.”<sup>114</sup> DTC therefore concludes that “[t]here 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.”<sup>115</sup>

With respect to commenter’s assertions that the Commission’s opinion in International

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Id.

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Id.

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See DTC Letter I at 5.

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See DTC Letter I at 5 (citing Exchange Act Sections 15A(b)(6) and 6(b)(5)).

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See DTC Letter I at 5.

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See DTC Letter I at 5. DTC also characterizes FINRA Rule 6490 and NASDAQ Rule 5815 as “appeals from fact-intensive determinations.” It contrasts this with the Proposed Rule Change, which it states does not contemplate that DTC will engage in independent fact finding. See DTC Letter I at 7.

Power, and specifically its references to FINRA Rule 9558, indicates a hearing is required, DTC notes the Commission’s statement that “DTC may design such processes in accordance with its own internal needs and circumstances.”<sup>116</sup> In addition, DTC provides that the reference to FINRA Rule 9558 was regarding notice and expedited fair process where action is necessary to avoid imminent harm.<sup>117</sup>

## 2. Comments Regarding Due Process

One commenter questions whether DTC’s procedures provide issuers with due process, and specifically the “opportunity to present its objections to the allegations that form the justification for the restriction.”<sup>118</sup> It believes DTC should allow the issuer to “litigate” the issues raised in the regulatory proceeding that forms the basis of a Global Lock.<sup>119</sup>

DTC responds by stating that Section 17A establishes its obligations, not the Fourteenth Amendment’s due process clause.<sup>120</sup> It further states that even if due process standards did apply, the Proposed Rules meets those standards; due process does not require an evidentiary or in-person hearing.<sup>121</sup>

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<sup>116</sup> See DTC Letter II at 2.

<sup>117</sup> See DTC Letter II at 2.

<sup>118</sup> See Kogan Letter at 4.

<sup>119</sup> See Kogan Letter at 4.

<sup>120</sup> See DTC Letter I at 4.

<sup>121</sup> Id.

### C. Fair Procedures

#### 1. Comment Regarding Requirement to Provide a Legal Opinion

One commenter is concerned that Proposed Rule 22(A) gives DTC the authority to require a Legal Opinion covering any issuer security deposited at any time rather than only those securities deposited over the specific time frames that are the subject of concern.<sup>122</sup> This commenter states that this open-ended inquiry imposes an unfair burden on issuers.<sup>123</sup>

#### 2. Comments Regarding Disproportionate Burden on Smaller Issuers

Commenters note that most of the issuers affected by DTC's actions with respect to the imposition of a Deposit Chill or Global Lock will likely be small and midsize companies, and that Restraints of DTC services can dramatically affect the lives of the officers, directors, and shareholders of these companies.<sup>124</sup> For this reason, two commenters believe that DTC must ensure a fair process that will reduce the likelihood of harm to innocent parties – including the issuer and its investors.<sup>125</sup>

One commenter questions why Sections 3 and 4 of Proposed Rule 22(B) adversely treats former shell companies and believes they should be treated the same as any other public companies.<sup>126</sup>

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<sup>122</sup> See Sichenzia Letter I at 5.

<sup>123</sup> See Sichenzia Letter I at 5.

<sup>124</sup> See STA Letter at 2; Sichenzia Letter I at 6.

<sup>125</sup> See STA Letter at 2.

<sup>126</sup> See Sichenzia Letter I at 6.

### 3. Comments Regarding Timing for Lifting a Deposit Chill

One commenter believes that the timing for lifting a Deposit Chill as compared to a Global Lock is counter-intuitive.<sup>127</sup> According to this commenter, a Global Lock, which is typically imposed as a result of enforcement proceedings, should not be easier to remedy than a Deposit Chill, which is usually imposed based on “mere” concerns regarding a security’s eligibility.<sup>128</sup> The commenter recommends that Deposit Chills be lifted automatically after a certain period of time.<sup>129</sup>

One commenter is concerned that the Proposed Rules do not address cases of issuers whose securities were subjected to a Deposit Chill prior to the Commission’s opinion in International Power.<sup>130</sup> This commenter suggests Deposit Chills imposed prior to International Power be lifted after a certain period of time or DTC should follow procedures to make a “fairness determination” based on the facts and circumstances of a particular case.<sup>131</sup> In its response, DTC states that if an issuer whose securities were restricted prior to International Power requests a review, DTC has been following the procedures in the Proposed Rules.<sup>132</sup>

### 4. Comments Regarding Timing for Lifting a Global Lock

Under Proposed Rule 22(B), the trigger for releasing a Global Lock is the resolution of the regulatory matter in a judicial order or an administrative decision (or some other indication

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<sup>127</sup> See Brilleman Letter at 2.

<sup>128</sup> See Brilleman Letter at 2.

<sup>129</sup> See Brilleman Letter at 2.

<sup>130</sup> See Brilleman Letter at 1.

<sup>131</sup> See Brilleman at 1.

<sup>132</sup> See DTC Letter I at 13.

that the issuer was incorrectly identified in the Proceeding). One commenter believes this standard is not workable because matters instituted by regulatory agencies may not be resolved for many years, if at all, may not be resolved in a formal fashion, and may be resolved only regarding some Defendants or some claims.<sup>133</sup> The commenter recommends that issuers affected by a Global Lock or a Deposit Chill should be permitted to apply to DTC one year after the imposition of any Deposit Chill or Global Lock to have their affected securities declared Eligible Securities.<sup>134</sup> This application could include a Legal Opinion that DTC may rely upon, and DTC could afford issuers a hearing under DTC Rule 22 should DTC determine not to release the relevant restriction based on the Legal Opinion.<sup>135</sup>

Another commenter argued that the timing for the release of a Global Lock is too long and stated “it would be a near miracle if a public company in need of working capital were able to survive through years of being subject to a [G]lobal [L]ock.”<sup>136</sup> This commenter recommended lifting a Global Lock six months or one year after the commencement of an enforcement proceeding, and believes at such time the burden is on the Commission to take action to suspend any further trading in the issuer’s securities.<sup>137</sup>

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<sup>133</sup> See STA Letter at 6.

<sup>134</sup> See STA Letter at 7.

<sup>135</sup> See STA Letter at 7.

<sup>136</sup> See Sichenzia Letter I at 5.

<sup>137</sup> See Sichenzia Letter I at 5.

## 5. Comments Regarding Public Notice of Deposit Chills and Global Locks

Two commenters recommend that DTC make a list of companies subject to Deposit Chills and Global Locks publicly available on its website.<sup>138</sup> Commenters stated that issuers subject to these restrictions often do not inform their shareholders or potential investors and at times issuers misrepresent the reasons for the imposition of the restrictions in order to continue raising capital.<sup>139</sup> These commenters also believe publicizing which issuers are subject to DTC restrictions would deter future fraudulent securities sales and protect investors.<sup>140</sup>

One investor also states that publication of issuer and DTC responses would be beneficial to shareholders and potential investors.<sup>141</sup> Another commenter requests the publication of Legal Opinions, arguing that this would reduce the number of restrictions and reduce the impact on the market.<sup>142</sup>

DTC states that while it understands commenters concerns, it is the issuer's responsibility to decide whether to disclose all of this information.<sup>143</sup> DTC issues an Important Notice when imposing a Global Lock and those Important Notices are published on DTC's website.<sup>144</sup> In its

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<sup>138</sup> See Hamilton Letter at 1; DTCC BigBake Letter I at 1; DTCC BigBake Letter II at 1.

<sup>139</sup> See Hamilton Letter at 1; DTCC BigBake Letter I at 1.

<sup>140</sup> See Hamilton Letter at 1; DTCC BigBake Letter I at 1.

<sup>141</sup> See Hamilton Letter at 1.

<sup>142</sup> See DTCC BigBake Letter I at 2.

<sup>143</sup> See DTCC Letter at 12.

<sup>144</sup> See DTCC Letter at 12.

response, DTC provides that it is considering whether similar disclosures regarding Deposit Chills would be appropriate.<sup>145</sup>

6. Comment Regarding Persons Authorized to Initiate Process and Make Final Determinations

One commenter expressed concern over the number of individuals who would be “Officers” under the Proposed Rules, and thus able to make decisions to deny an issuer access to DTC.<sup>146</sup> This commenter stated any such decisions “should be given serious and formal consideration by senior, experienced professionals that are familiar with securities markets and the federal securities laws, and that have the authority and independent to make decisions.”<sup>147</sup> With respect to independence, this commenter recommends that an Officer making these decisions should be in a separate reporting line or senior to the Officer who made the initial decision. Along these lines, the commenter believes the Board of Directors should appoint specific officers to review issuer responses and make decisions.<sup>148</sup>

In its response to these comments, DTC notes that DTC Officers are by definition “high ranking and charge with substantial responsibility.”<sup>149</sup> In addition, DTC believes the reviewing Officer is independent because it was not involved in the decision to impose the restriction in the first instance.<sup>150</sup>

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<sup>145</sup> See DTCC Letter at 12.

<sup>146</sup> See STA Letter at 4.

<sup>147</sup> See STA Letter at 4.

<sup>148</sup> See STA Letter at 4.

<sup>149</sup> See STA Letter at 11.

<sup>150</sup> See STA Letter at 11.



One commenter recommends that the Proposed Rules be amended to require that the initiation of an action to impose Deposit Chills should be authorized by senior Officers of DTC designated by the Board of Directors, or the Chief Executive Officer, to take such actions.<sup>151</sup> DTC believes this is unnecessary because a senior-level committee of officers from DTC's Operations, Risk Management, Product Management, Application Development and Maintenance, Legal and Compliance currently make, and will continue to make, the decision to impose service restrictions.<sup>152</sup>

IV. Description of Amendment No. 1

As noted above, one commenter requested that DTC send the Deposit Chill Notice to the issuer's transfer agent in addition to the issuer itself.<sup>153</sup> Amendment No. 1 incorporates this requirement into the Proposed Rules and provides that DTC will send a copy of the Deposit Chill Notice to the issuer's transfer agent via overnight courier.

V. Description of Amendment No. 2

Amendment No. 2 makes a number of clarifying revisions to the Proposed Rules to more accurately reflect their intended operation.

First, DTC proposes to amend Proposed Rules 22(A)(2)(A)(i) to clarify that when the Deposit Chill Notice is sent prior to the imposition of a Deposit Chill, the date included as the date the Deposit Chill will be imposed sets forth the date in circumstances in which the issuer does not respond to the Deposit Chill Notice in the time or manner provided in the Proposed Rules.

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<sup>151</sup> See STA Letter at 4.

<sup>152</sup> See DTC Letter I at 11.

<sup>153</sup> See STA Letter at 6.

Second, DTC proposes to amend Proposed Rule 22(A)(2)(A)(iv) to clarify that DTC may extend the date for an issuer to submit a Deposit Chill Response “up to” an additional twenty Business Days.

Third, DTC proposes to revise Proposed Rule 22(A)(2)(c) to provide when the issuer fails to comply with a deadline in connection with an Additional Information Request, DTC will provide the issuer with a Deposit Chill Decision within twenty Business Days after the missed deadline.

Fourth, DTC proposes to clarify that the Additional Information Request and the Additional Information Response are part of the record for purposes of any issuer appeal to the Commission under Proposed Rule 22(A)(2)(d).

Fifth, DTC proposes to amend Proposed Rule 22(A)(3)(a), which provides that unless the DTC expressly waives or extends in writing the applicable period for a submission of a Deposit Chill Response, an issuer waives the right to make the submission for which the deadline has passed. DTC’s amendment would revise this section so that the reference to a DTC waiver relates to the applicable period for any type of submission provided for under Proposed Rule 22(A) and not only to a Deposit Chill Response.

Sixth, DTC proposes to amend Proposed Rule 22(A)(3)(c) to correct the reference to “Deposit Chill Response” by replacing it with “Deposit Chill Decision.”

Seventh, among the criteria for determining the application of the procedures provided under Proposed Rule 22(B), Section 1(b) provides that the procedures will apply where a Global Lock has been imposed as a result of an issuer’s failure to satisfy the requirements for lifting a Deposit Chill in Proposed Rule 22(A)(2)(c). DTC proposes to amend Proposed Rule 22(B)(1)(b)

to clarify that the procedures in Proposed Rule 22(B) will also apply where an issuer has failed to satisfy the requirements for not imposing a Deposit Chill.

Eighth, DTC proposes to amend Proposed Rules 22(B)(2)(a)(i) to clarify that when the Global Lock Notice is sent prior to the imposition of a Global Lock, the date included as the date the Global Lock will be imposed sets forth the date in circumstances in which the issuer does not respond to the Global Lock Notice in the time or manner provided in the Proposed Rules.

Ninth, DTC proposes to amend Proposed Rule 22(B)(2)(a)(iii) to clarify that DTC may extend the date for an issuer to submit a Global Lock Response “up to” an additional twenty Business Days.

Tenth, DTC proposes to amend Proposed Rule 22(B)(2)(c) to provide in the case of a Global Lock imposed before issuance of the Global Lock Notice, DTC will provide the issuer with a Global Lock Decision within ten Business Days after receipt of the Global Lock Response, rather than within ten Business Days after imposition of the Global Lock.

Eleventh, DTC proposes to amend Proposed Rule 22(B)(2)(c) to clarify that, in the event that DTC reasonably determines that a Global Lock Response does not satisfy the requirements of the Global Lock Notice, in addition to not releasing a Global Lock that is already in place in, DTC will also impose a Global Lock if one is not yet in place.

Twelfth, DTC proposes to add a new provision providing that if DTC imposes a Global Lock pursuant to Proposed Rule 22(B)(5)(b) that the procedures contained in Proposed Rule 22(B) will apply, including that DTC will provide a Global Lock Decision within ten Business Days after it receives the Global Lock Response.

VI. Proceedings to Determine Whether to Approve or Disapprove SR-DTC- 2013-11 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act to determine whether the Proposed Rules should be approved or disapproved. As noted above, institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to comment on the Proposed Rule as set forth in Amendment Nos. 1 and 2, and provide the Commission with arguments to support the Commission’s analysis as to whether to approve or disapprove the proposal, as amended.

Pursuant to Section 19(b)(2)(B) of the Exchange Act,<sup>154</sup> the Commission is providing notice of the grounds for disapproval under consideration. In particular, Section 17A(b)(3)(H) requires, among other things, that the rules of a clearing agency provide a fair procedure when the clearing agency prohibits or limits access to the clearing agency’s services to a person.<sup>155</sup> In addition, Section 17A(b)(5) of the Exchange Act requires clearing agencies, when determining whether to deny or limit access to its services, (i) to give persons in any proceeding an opportunity to be heard upon the specific grounds for the denial, prohibition, or limitation, and (ii) to keep a record of those proceedings.<sup>156</sup>

As noted above, commenters raised concerns as to whether the Proposed Rules are consistent with the requirements to provide “fair procedures,” “notice” and “an opportunity to be heard.” The Commission believes that question remain as to whether the Proposed Rules are consistent with the requirements of the Exchange Act.

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<sup>154</sup> 19 U.S.C. 78s(b)(2)(B).

<sup>155</sup> 15 U.S.C. 78q-1(b)(3)(H).

<sup>156</sup> 15 U.S.C. 78q-1(b)(5).

Section 19(b)(2)(B) of the Act provides that proceedings to determine whether to approve or disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. The time for conclusion of the proceedings may be extended for up to an additional 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding or if the self-regulatory organization consents to the extension.

## VII. Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the concerns identified above, as well as any others they may have with the Proposed Rules, as amended. In particular, the Commission invites the written views of interested persons concerning whether the Proposed Rules, as modified by Amendment Nos. 1 and 2, are inconsistent with Sections 17A(b)(3)(H) and 17A(b)(5) or any other provision of the Exchange Act, or the rules and regulations thereunder.

Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.<sup>157</sup> Interested persons are invited to submit written data, views, and arguments on or before [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal on or before [insert 35 days from the date

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<sup>157</sup> Section 19(b)(2) of the Exchange Act, as amended by the Securities Acts Amendments of 1975, Pub. L. 94-29, 89 Stat. 97 (1975), grants the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

of publication in the Federal Register]. 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-2013-11 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-DTC-2013-11. 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 website (<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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings also will be available for inspection and copying at the principal office of DTC and on DTC's website at <http://dtcc.com/en/legal/sec-rule-filings.aspx>. 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-2013-11 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. If comments are received, any rebuttal comments should be submitted on or before [insert 35 days from the date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>158</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>158</sup> 17 CFR 200.30-3(a)(57).