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August 11, 2016

Brent J. Fields, Secretary
United States Securities and Exchange Commission
Division of Trading and Markets
100 F Street, NE
Washington, D.C. 20549

Re: Release No. 34-77991; SR-DTC-2016-003 (the "Proposing Release")

Transfer agents, broker-dealers, clearing and settlement firms as well as public company investors and issuers rely on the services provided by DTC for seamless movement of securities, transfers, new issuances, voting, splits, dividends, reorganizations and other matters[1]. DTC has long been the mainstay and adopted the technology and systems appropriate for its core responsibilities. DTC stands second to none despite a monopoly position and ownership by its members, principally large financial institutions. DTC interacts only with securities brokers, dealers, institutional investors, depository institutions, issuing and paying agents and settling firms. Individual investors do not interact with DTC, but are affected by its activities and decisions greatly. Professionals would be hard pressed to find any fault with the central role played by DTC.

It continues to be a surprise therefore that DTC seeks confirmation from the SEC for an expansive role in substantive regulation of securities issuers which impacts investors. The Proposing Release contains DTC's latest effort to establish rules in its years old effort to expand DTC authority validating its historical foray into imposition of chills and locks (collectively, "chills"). In 2012 the SEC determined that DTC did not meet various "fairness" standards in these activities.

DTC's unilateral actions, howsoever flawed, have been imposed principally when smaller issuers are suspected of involvement with wrongdoers. DTC imposed chills have caused unqualified harm and losses to many innocent investors and all but prevented capital formation and access to serious investors and brokerage firms for those affected companies. Widespread acknowledgement of unfair processes surrounding the imposition and removal of chills by DTC came to light publicly in 2012 but even prior were widely known to issuers and their advisors. DTC's actions can be excessive and when chills imposed, provide inadequate footing to protect the public trading markets from losing essential electronic clearance and settlement of trades via

[1] http://www.dtcc.com/about/businesses-and-subsidiaries/dtc.aspx

DWAC for transfers, DRS bookkeeping and DTC FAST issuance. In many cases, DTC actions imposing a chill are only based upon flimsy legal footing, notice of commencement of an investigation or inquiry, anecdotal observations or even unproven news stories.

This new super-gatekeeper role for DTC has neither been mandated by clear legislation nor encouraged by the SEC or other regulators, but taken on by DTC "*sua sponte*" over the course of time. To be the gatekeeper for continued access to DTC services is to place a huge responsibility on DTC to police itself and make correct determinations, and puts DTC in the role of making decisions long the province of agencies and instrumentalities of government. To establish in DTC such authority merely because it adopts rules for "post-action" appeal, as the Proposing Release would allow, gives DTC unchecked power which historically would follow full investigation by authorities with subpoena power and other tools well versed in the legality of actions and knowledge of guilty actors. Factual ambiguity, regulatory and judicial uncertainty, the presumption of innocence implicit in our system and the imperfect judgement of staff all would consume DTC and allow DTC to continue the practices which could harm the smooth functioning of securities markets, particularly for smaller issuers who do not possess the resources to defend themselves. Even with the potential for an issuer to appeal DTC chill orders irreparable damage would already have been done - long before the facts are in. DTC also proposes no process whereby an investor may appeal a chill. DTC already refuses any contact with investors, and failing to provide the right for investors to directly lodge appeals under the Proposing Release prevents those who are most affected by a chill from being heard and fails the baseline test of fairness as directed by the SEC. Accordingly, we believe there exist no level of pre-activity notice or post-chill appeal rights that could be considered fair and DTC should not assume the role of imposing chills unless specifically ordered to do so by a regulatory body, SRO or court that deems such specific action warranted. If the DTC remedy (a chill) precedes a determination of guilt how then is due process and fairness ever to be assured?

DTC's gatekeeper role is a historical anecdote stemming from its unique power to shut electronic clearance and settlement of securities with the flip of a switch given its monopoly position over electronic movement of securities. The historic evolution of electronic trading has allowed for DTC to become the virtual highway for vast numbers of transactions. Impeding electronic transactions is at odds with the legislative mandate of the SEC to encourage electronic clearance and settlement, not turn back the clock to a day when paper transfers ruled the day – as required when a chill is put in place. Expanding the role of DTC may be a mandate of the bank members that control DTC in part viewed as desirable to insulate themselves from financial fines and penalties if their own compliance activities fall short, but in our view improved compliance is not achievable through the expansion of DTC chills. Given the immensity of the challenge due to the continually shifting sands of what constitutes lawful versus unlawful behaviors in connection with the purchase and sale of securities, through judicial and regulatory decisions, the existing enforcement mechanisms, and quilt work of agency and SRO coverage, broker scrutiny, transfer agent practices, and clearance and settlement firms overseeing the field there appears to already be ample opportunity to take action without injecting yet another regulator in the field.

When DTC acts, and if it were to take the leading role from these entities before factual or evidentiary processes run their course, issuers could be destroyed, innocent investors wiped out and the proverbial baby thrown out with the bath water, because not all persons affected by a chill are the same – a chill affects the guilty and the innocent similarly stopping trading clearance and settlement in its tracks with the flip of a switch. Nowhere has DTC or the Proposing Release addressed the unfortunate results that befall innocents caught up by a chill, nor the immensity of the costs and burdens placed on issuers and investors seeking to clear a chill.

The essence of our position stems from experience. The remedy of merely having appeal rights to an action already taken is, by definition, "unfair" not capable of meeting the regulatory standard because the very act of throwing the switch denies investors and issuers rights to electronic services for which they have previously qualified and should be entitled to continue to benefit from. When a regulator has a target in its sights, it has ready access to tools that focus its energies directly upon the bad actor, and fashions remedies targeting shares held by a bad actor at a specific brokerage, or by addressing legal malfeasance for deficient Rule 144 opinions, or by requiring corrective action for misstatements in registration statements, and if necessary to address an issuer generally, seeking a temporary suspension of trading – all following investigation and review, issuance of formal orders and other legal authorization that requires evidence of misconduct warranting precise actions to address the exigencies of a specific situation. DTC is not in a better position to weigh these considerations. Even national stock exchanges struggle with the equities involved in their trading halts and suspensions despite extensive resources dedicated to real-time monitoring for suspicious trading activity, with their sophisticated computer systems and dedicated staff. "The [Nasdaq] MarketWatch team reviewed 387,260 surveillance alerts in 2015, resulting in 689 referrals to Finra for further review and drill-down on the activity at the brokerage firm level. Finra has its own proprietary market surveillance software, called Sonar, that it uses to identify activity for review. That surveillance is supplemented by the referrals and tips from customers, the public or exchanges like Nasdaq." [2]

NASDAQ FAQ 1038 states "MarketWatch provides real-time surveillance for activity on the Nasdaq Stock Market, Nasdaq BX, Nasdaq PSX, Nasdaq and Nasdaq BX Options Markets, and Nasdaq Futures to maintain an orderly marketplace and level playing field for investors, market participants and listed companies." The FAQ continues: "When activity is suspected of being potentially in violation of Exchange rules and policies, MarketWatch refers the activity to FINRA's regulatory groups for further review and potential disciplinary action. … MarketWatch implements fair and independent decisions within the scope of its authority and without influence from other Nasdaq offices. MarketWatch also recognizes the need to have technical

[2] http://www.marketwatch.com/story/to-catch-a-thief-how-nasdaq-watches-for-insider-trading-2016-06-09

expertise on staff to assist with maintaining regulatory compliance .... "[3] DTC has none of these resources and has made no such commitment to fairness, technical expertise or influence when it acts. Nasdaq and the other national exchanges can and do impose trading halts[4], but do not attempt to supplant the role of government regulators for law enforcement and violations. Instead, issuers and their counsel often receive letters seeking additional information triggered by a Nasdaq screening process that identifies unusual trading, referred to FINRA for further investigation and where warranted to the SEC or DOJ for action if illegality is suspected. However, the exchanges move with all deliberate speed to remove the trading halt and permit the markets to continue to function – not by imposing burdens on issuers to submit appeals but on their own volition. Even exchanges struggle with the unfair damage done by trading halts. History has shown that trading halts may tend to hurt, not help, the issues it is designed to protect, as recently reported in the Wall Street Journal.[5] How then can institutionalizing yet another layer of stops, with a multitude of steps for post action appeal before DTC restores service, help the balancing act already performed by the numerous bodies responsible for maintaining efficient functioning of the US securities market? Adding DTC would be a little like an electric company faced with excessive demand, not only reducing consumption via brownouts but also physically disconnecting from businesses the power lines that deliver the electricity, asking the businesses to prove that they have not in the past and will not in the future use excessive electricity before sending service people out to reconnect a company's power lines. No rules should be adopted, and DTC should end its imposition of chills. Furthermore, without specific comment from the major exchanges and OTCLink regarding coordination with DTC and a reasonable conclusion reached by the SEC that by acting DTC would not interfere with the objectives of the exchanges and other regulators and not hamper the smooth functioning of the markets, all further action on the Proposing Release should be deferred. Neither the exchanges nor OTCLink have commented on the Proposing Release or problems of coordination and inconsistent execution. Suspending clearance of already priced trades within the clearance and settlement cycle, prior to or following a trading halt, would seem to raise numerous problems of its own and only exacerbate the efforts of the exchanges to improve recovery from a trading halt, and be yet a further disruption of the smooth functioning of the securities markets.

As practitioners whose representation has included numerous issuers and investors in the midst of challenging – often successfully – chills, we have worked with DTC and their counsel on numerous occasions. We have successfully removed chills and restored access to DTC services. In doing so we have made clear on many occasions that the initial basis on which the chill was issued was flawed. In general, successful removal falls into one or more of three categories: 1) it was based upon incomplete information available to DTC, 2) it was not supported to remedy an actual law violation but only a presumed violation noted in the press, or

[3] https://listingcenter.nasdaq.com/Material_Search.aspx?cid=16&mcd=LQ&sub_cid=42
[4] https://listingcenter.nasdaq.com/Material_Search.aspx?cid=16&mcd=LQ&sub_cid=42
[5] Wall Street Journal, August 8, 2016 *"U.S. Stock Exchanges to Overhaul Process for Reopening Trading After Halt"*.

3) a further opinion of counsel was able to validate proper securities issuances. This means that many of these chills should never have been imposed in the first place, and diligent review by DTC might have known that to be the case. While DTC's responsiveness is commendable assisting in providing for remedial removal when appropriate, can it be said that the initial chill imposition by DTC on its own volition could ever be fair? We do not believe so merely because DTC agrees to afford issuers a short advance notice response period preceding the potential action and an appeal process, partly because of what we have seen to be required by DTC to satisfy its standards on appeal, as more fully explained below. The SEC should not act on the Proposing Release without also addressing the fairness of the appeal standards, and not leave the requirements solely to DTC since ofttimes, we have seen they are unobtainable without great cost, time or expense, if at all.

In our experience, DTC is unwavering in its demand issuers produce a legal opinion that "*all*" issuances of securities from the beginning of an issuers existence be produced to remove a chill and establish lawfulness of the outstanding securities pool, as well as of the undifferentiated bulk of securities on deposit in DTC's system as street name securities. Sometimes spanning decades and tens of thousands of issuance events this is an unimaginable and unobtainable obligation, and even when possible, can only be produced at great cost and with an enormous time burden – most often imposed upon smaller issuers struggling financially. This is too high a bar for a "fair" appeal process the only result of which will be to allow DTC to winnow the field of companies separating the vulnerable smaller or inadequately capitalized issuers from those eligible to participate in DTC when DTC determines to impose a chill – perhaps intentionally seeking to remove from DTC the smaller riskier issuers. This is indicative of the type of discretion we anticipate will be continued by DTC in handling appeals that would continue upon adoption of the Proposing Release. The SEC should not act without a full appreciation and approval of just what is meant to appeal a chill, and approval of the specific criteria that DTC will use and requirements to terminate a chill. Current experience suggests the "asks" from DTC are an insurmountable burden for most companies that would be subject to a chill event. Without addressing just what DTC may ask for and be satisfied within an appeal scenario, the SEC will not have been able to rule on whether DTC's rules are, in fact, "fair". We would posit that a legal opinion from the beginning of an issuer's existence or even a shorter period could never constitute a fair process.

Dexter v. DTC, et. al.[6] established DTC's immunity from lawsuits even for negligence and conversion. This important New York decision concluded that like FINRA (formerly NASD), DTC is immune from liability as a self-regulatory organization ("SRO"). Neither issuers nor shareholders aggrieved by DTC have any recourse for unfounded chills, failures, mistakes or negligence by DTC. Due to the more limited oversight the SEC gives DTC relative

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[6] 406 F.Supp.2d 260 (S.D.N.Y. 2005). See also, In re Series 7 Broker Qualification Exam Scoring Litigation, 510 F. Supp. 2d 35 (D.D.C 2007).

to the vast attention given the exchanges and FINRA, a further reason that DTC should not be the arbiter of imposition of chills exists and that this function is best left in the hands of the exchanges and other regulatory bodies with the tools and resources required who could direct DTC to impose a chill when warranted. If DTC agreed to give up its immunity and face the potential of challenges in court, even face class actions from similarly aggrieved companies who received chills, only then would the ensuing transparency and checks and balances provide potentially fair results in chill and appeal scenarios. This is not the case today.

In conclusion, we do not believe it possible for DTC to be "fair" if there are circumstances in which DTC sets its own standards and acts on its own accord to impose a chill not directed by a traditional regulator or court. Subsection (a), (b) and (c) of Section 1 of the Proposing Release seem to be generally consistent with that approach although retaining in DTC discretion beyond a specific regulatory or court order directing DTC to take action, thus still opposed. Furthermore, if the SEC accepts that DTC may act on its own accord, as presently contemplated under Subsection (d) of Section 1, we believe the SEC should approve the specific methods by which an issuer can successfully appeal and require DTC to remove the chill (or provide for automatic removal after a short period) that are fair and reasonable that do not burden smaller issuers with excessive costs or delays during the denial of the DTC's essential services. The problem remains that the chill impacts all or none, and cannot differentiate the accused from the innocent because of the essential nature of DTC's street name fungible bulk method of holding securities. The burden of proving the chill is tailored to address a particular circumstance would need to be required of DTC, rather than from the potentially innocent issuer or its innocent investors (who DTC practices prevent from direct interaction with DTC), before a chill should be allowed to be put in place merely because DTC "becomes aware of a need for immediate action" under Subsection (d). DTC claims its actions are necessary to maintain a "status quo" while the basis is investigated however the denial of its important services to a previously eligible issuer hardly constitutes maintaining the status quo. Giving authority to DTC to chill merely upon the initiation of an investigation or enforcement proceeding where it concludes a threat is imminent requiring immediate action remains troubling. Investigations can be suspended, enforcement proceedings abandoned, prosecutions terminated, accused acquitted and appeals successful. Therefore we believe the Proposing Release does not satisfy the requirements set out by the SEC in International Power Group, Ltd., Ad Proc. File No. 3-13687 (March 15, 2012). As noted by the Securities Transfer Association Inc. ("STA") in their June 30, 2016 letter in response to the Proposing Release "DTC is a monopoly provider of essential services in connection with the clearance and settlement of equity securities transactions" that "must provide fair procedures to "persons" that are denied access to the facilities that it operates". That DTC's actions fall under and are governed by the SEC pursuant to Section 17A of the Securities Exchange Act of 1934 was definitively established in 2013 when a "chill" imposed by DTC on a small issuer came under scrutiny by the SEC which ruled that DTC had not provided procedures that assured the fairness requirements of Section 17A(b)(3)(H). The latest revisions continue to fail to provide the essential fairness required by that decision. That International Power Group remains *to this day* subject to the global lock chill imposed in 2009 speaks volumes.

Respectfully submitted,

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