

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-59088; File No. SR-DTC-2008-13)

December 11, 2008

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by The Depository Trust Company Relating to Eliminating the SRO Requirement as a Condition of DTC-Eligibility for Securities that are Eligible for Resale under Rule 144A under the Securities Act of 1933

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> notice is hereby given that on October 9, 2008, The Depository Trust Company (“DTC”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by DTC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

DTC proposes to eliminate the SRO Requirement, as defined below, as a condition of DTC-eligibility for securities that are eligible for resale under Rule 144A (“Rule 144A Securities”) under the Securities Act of 1933 (“Securities Act”).<sup>2</sup>

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

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

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

<sup>2</sup> 17 CFR 230.144A.

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

In April 1990, the Commission adopted Rule 144A under the Securities Act.<sup>3</sup> This rule provides a safe-harbor from the registration requirements of the Securities Act for resales to qualified institutional buyers (“QIBs”) of certain restricted securities that when issued were not of the same class as securities listed on a national securities exchange registered under the Act. Rule 144A(d)(2)<sup>4</sup> requires that the seller or any person acting on its behalf take reasonable steps to ensure that the purchaser is aware that the seller may rely on the safe-harbor provided by Rule 144A.

In 1993, the Commission approved a DTC rule filing whereby DTC would make Rule 144A securities eligible for deposit, book-entry delivery, and other depository services provided, in part, that DTC was required to “condition the eligibility of the Rule 144A Securities (other than Investment Grade Securities) on initial and continued inclusion of those securities in an SRO Rule 144A System, such as the NASD’s PORTAL Market System.”<sup>5</sup> This condition is referred to herein as the “SRO Requirement.” The SRO Requirement contemplated that an SRO Rule 144A System would include comprehensive safeguards to facilitate the SRO’s ability to detect violations of Rule 144A. However, the only SRO Rule 144A System that was developed was the NASD’s PORTAL Market System (“PORTAL”) and not only did PORTAL not develop as anticipated but also it did not include the safeguards contemplated by the DTC rule filing and

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<sup>3</sup> Supra note 2.

<sup>4</sup> 17 CFR 230.144A(d)(2).

<sup>5</sup> Securities Exchange Release No. 33327 (Dec. 13, 1993), 58 FR 67878 (Dec. 22, 1993) [File No. SR-DTC-90-06]. “Investment Grade Securities” are defined in this release as nonconvertible debt securities and nonconvertible preferred stock which are in one of the top four categories by a nationally recognized statistical rating organization.

Commission order of 1993.<sup>6</sup> In light of the above, DTC believes that the SRO Requirement is no longer necessary or appropriate.

DTC believes that eliminating the SRO Requirement will result in a uniform procedure for making Rule 144A Securities DTC-eligible whether or not they were classified as investment grade securities. Under the proposed rule change, issuers and participants would continue to be responsible for determining that their deposit of Rule 144A Securities with DTC and their transactions in Rule 144A Securities through the facilities of DTC are in compliance with existing DTC rules and the federal securities laws, such as:

- (i) Rule 2, Section 8, of DTC's rules: "In connection with their use of the Corporation's [DTC's] services, Participants and Pledges must comply with all applicable laws, including all applicable laws relating to securities, taxation and money laundering."
- (ii) DTC's "Operational Arrangements (Necessary for an Issue to Become and Remain Eligible for DTC Services)" relating to BEO issues being made eligible for DTC services: "Issuer recognizes that DTC does not in any way undertake to, and shall not have any responsibility to, monitor or ascertain the compliance of any transactions in the Securities with the following, as amended from time to time: (1) any exemptions from registration under the Securities Act of 1933; (2) the Investment Company Act of 1940; (3) the Employee Retirement Income Security Act of 1974; (4) the Internal Revenue Code of 1986; (5) any rules of any self-regulatory organizations (as defined under the Securities Exchange Act of

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<sup>6</sup> Securities Exchange Release No. 56172 (Jul. 31, 2007), 72 FR 44196 (Aug. 7, 2007) [File No. SR-NASDAQ-2006-65].

1934); or (6) any other local, state, federal, or foreign laws or regulations there under.”<sup>7</sup> This and other representations made by issuers to DTC pursuant to the DTC Operational Arrangements are mirrored in the Letter of Representations that DTC receives from issuers in connection with their deposits of BEO issues with DTC.

- (iii) When a Rule 144A Security is made DTC eligible, the issuer will continue to be required to execute a copy of the rider to the Letter of Representation in the form it appears today except that the reference to the SRO Requirement will be deleted.

DTC believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations there under because eliminating the unnecessary SRO Requirement will remove an impediment to the perfection of the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions.

#### B. Self-Regulatory Organization’s Statement on Burden on Competition

DTC does not believe that the proposed rule change will have any impact or impose any burden on competition.

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<sup>7</sup> In 1994, in an order clarifying certain language in the Rule 144A Approval Order, the Commission concurred in the position taken by DTC that “Rule 5 [of DTC’s rules] does not require DTC to determine whether securities, when deposited at DTC, may be transferred lawfully by book-entry in light of the Federal securities law.” Order Approving Proposed Rule Change Relating to a Clarification of Rule 5, Securities Exchange Act Release No. 33672, 56 SEC Docket 315 (Feb. 23, 1994) (“Rule 5 Clarification Order”). DTC Rule 5 was amended to delete any implication that DTC was under any statutory or contractual obligation to determine whether securities deposited with DTC could be legally transferred by book-entry.

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

Written comments relating to the proposed rule change have not yet been solicited or received. DTC will notify the Commission of any written comments received by DTC.

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

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

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

IV. Solicitation of Comments

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

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>) or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-DTC-2008-13 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 No. SR-DTC-2008-13. This file number should be included

on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. to 3:00 p.m. Copies of such filing also will be available for inspection and copying at DTC's principal office and on DTC's Web site at [http://www.dtcc.com/legal/rule\\_filings/dtc/2008.php](http://www.dtcc.com/legal/rule_filings/dtc/2008.php). 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 No. SR-DTC-2008-13 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.<sup>8</sup>

Florence E. Harmon  
Acting Secretary

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<sup>8</sup> 17 CFR 200.30-3(a)(12).