

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59102; File No. SR-DTC-2008-11)

December 15, 2008

Self-Regulatory Organizations; The Depository Trust Company; Order Approving a Proposed Rule Change to Implement a New Service to Allow Issuers to Track and Limit the Number of Beneficial Owners for an Individual CUSIP

I. Introduction

On August 6, 2008, The Depository Trust Company (“DTC”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”).¹ On September 5, 2008, the Commission published notice of the proposed rule change in the Federal Register to solicit comments from interested persons.² The Commission received one comment letter in response to the proposed rule change.³ For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description

The rule change provides for the implementation of a new service that will allow issuers, either themselves or through an issuer-designated administrator, to track and limit the number of beneficial owners of their privately transacted and closely held securities. This service will be called the Security Holder Tracking Service (“SH Tracking Service”).

The SH Tracking Service will facilitate the book-entry settlement and asset servicing for securities that are privately transacted and closely held by providing a tool for issuers and their agents to monitor and limit the number and character (e.g., qualified institutional buyers or

¹ 15 U.S.C. 78s(b)(1).

² Securities Exchange Act Release No. 58436 (Aug. 27, 2008), 73 FR 51870.

³ Letter from Brent Welke, CEO, Agnova Corporation (Sept. 8, 2008).

“QIBs”) of beneficial owners of its securities (“Tracked Securities”).⁴ Although the SH Tracking Service was developed to address the specific concerns of Rule 144A securities,⁵ in practice DTC envisions that it could be utilized for other types of securities for which the number or character of the beneficial owners requires some level of control.

The eligibility process for a Tracked Security to be made and remain DTC-eligible will not change from DTC’s current process. However, under the new system, DTC will be requested in writing to set up a specific CUSIP for tracking such securities⁶ and will be notified who will perform the function of the issuer’s administrator for the CUSIP in the SH Tracking Service.⁷ Upon receipt of all of such documentation, DTC will make the CUSIP DTC-eligible and will activate the tracking indicator on its security master file. Additionally, once it is made eligible, DTC will perform asset servicing for the issue.

The issuer’s administrator will control movements of the particular CUSIP for which it had been appointed. Once the tracking indicator has been activated on the master file and the Administrator has been appointed, no transfer of the securities will take place in the Tracked Security without the approval of the administrator through DTC’s Inventory Management System (“IMS”). The administrator, based on requirements of the issuer, will be solely responsible for determining whether a transaction should be effected in DTC. Once approved by

⁴ Issuers must control the number of beneficial owners pursuant to certain registration and reporting requirements. In order for issuers to be able to avoid the periodic reporting requirements required by the Act, they must not have more than 500 beneficial owners. 15 U.S.C. 78l(g), 15 U.S.C. 78m(a), 15 U.S.C. 78o(d).

⁵ 17 CFR 230.144A

⁶ DTC anticipates that this instruction will come from the underwriter at the time of the initial distribution at DTC.

⁷ DTC anticipates that the issuer’s transfer agent will serve as its administrator.

the administrator, DTC will perform centralized book-entry settlement. IMS will only allow an administrator access to view and approve transactions for CUSIPs for which it had been appointed administrator as reflected in DTC's records.

Because DTC is relying solely on the instructions of the administrator in order to effect settlement in Tracked Securities and will have no knowledge of the number or character of the underlying beneficial owners, use of the SH Tracking Service by any party will constitute an agreement that DTC shall not be liable for any loss or damages related to the use of the SH Tracking System. Each user of the SH Tracking Service must agree to indemnify and hold harmless DTC and its affiliates from and against any and all losses, damages, liabilities, costs, judgments, charges, and expenses arising out of or relating to the use of the SH Tracking Service.

The Tracked Securities will not be held as part of a participant's general free account and will not be considered eligible collateral in DTC's settlement system.

To recover the costs of building the SH Tracking Service, DTC will add the following fees to its Fee Schedule:

- \$25,000 per CUSIP for SH Tracking Services
- \$5 per delivery and receive for Tracked Securities
- \$5 per receive and delivery for reclaims of Tracked Securities

III. Comment Letter

Brent Welke, CEO of Agnova Corporation, wrote that, in the context of the settlement cycle, "DTCC (sic) [should be] strictly liable for double ownership repercussions" and that "DTCC (sic) stockholders [should] jointly and severally guarantee DTCC obligations." Finally, Mr. Welke expressed concern about "brokers who are facilitating share counterfeiting."

IV. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to DTC. In particular, the Commission believes the proposal is consistent with Section 17A(b)(3)(F) of the Act,⁸ which requires that the rules of a registered clearing agency are designed to, among other things, promote the prompt and accurate clearance and settlement of securities transactions. DTC's creation of a service to assist issuers and their agents fulfill their regulatory obligations to monitor and limit the number of beneficial shareholders of their closely held securities should provide a meaningful incentive for issuers and participants to utilize DTC's depository services, which should provide more efficient processing of such transactions by reducing the incidence of physical processing outside of DTC.

The Commission duly notes the importance of the issue of short selling that the commenter appeared to be expressing and will continue to monitor developments in this area and assert its oversight responsibilities of industry participants with the view to ensure that appropriate safeguards are in place to facilitate the prompt and accurate clearance and settlement of securities transactions and to protect investors. However, that issue is outside the scope and purpose of this proposed rule change, which is to implement a service to allow issuers of closely held securities to enhance their compliance with federal securities laws.

⁸ 15 U.S.C. 78q-1(b)(3)(F).

V. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act⁹ and the rules and regulations thereunder.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁰ that the proposed rule change (File No. SR-DTC-2008-11) be and hereby is approved.¹¹

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.¹²

Florence E. Harmon
Acting Secretary

⁹ 15 U.S.C. 78q-1.

¹⁰ 15 U.S.C. 78s(b)(2).

¹¹ In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

¹² 17 CFR 200.30-3(a)(12).