March 14, 2003

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Attn: Margaret H. McFarland, Deputy Secretary

Re: Proposed Rule Change Concerning Requests for Withdrawal of Certificates by Issuers (File No. SR-DTC-2003-02)

Dear Ms. McFarland:

We appreciate this opportunity to respond to the Securities and Exchange Commission's ("Commission's") request for comments regarding the Depository Trust Company's proposed rule change concerning requests for withdrawal of certificates by Issuers (the "Proposed Rule"). The Proposed Rule would prohibit corporations from electing to have their securities removed from the DTC system. The undersigned respectfully requests that the Commission deny the proposed rule change of DTC until the Commission can investigate and consider the regulation of shortselling, and particularly so-called naked shortselling, of securities in small cap companies whose shares trade on the NASD Over-The-Counter Bulleting Board ("OTCBB").

As the Commission is aware, naked shortselling occurs when market participants shortsell the stock of a company and fail to adhere to their obligation under Rule 3370 of the NASD Rules of Procedure to "…make an affirmative determination that the member can borrow the securities or otherwise provide for delivery of the securities by the settlement date."

I. Legal Arguments Against Proposed Rule.

As a legal matter, DTC claims in its proposed rule change that its current rules and procedures do "not provide for DTC to comply with an Issuer Withdrawal Request without participants' instructions". DTC provides no specific citation to such rules because its rules are silent in this regard. That is, no rule prohibits withdrawal by an issuer.

DTC's proposal ignores another aspect of the DTC system that militates against the logic of its position. An issuer must execute and file a letter of representation with DTC before DTC will accept the shares of that issuer into its system. The issuer consent requirement confutes DTC's claim that the issuers who have withdrawn from its system "…have no legal or beneficial interest in the securities they are requesting to be exiting from DTC". While such statement may be true with respect to the ownership of or title to such securities, clearly the issuer has a legal interest in the securities in that the charter and bylaws of the issuer impose requirements and restrictions with respect to the transfer of shares of the issuer. If entry into the system requires consent of the issuer, it is difficult to understand how withdrawal from the system cannot also be made upon the determination of the issuer.

DTC's statement that securities generally become eligible for DTC services at the request or for the convenience of DTC's participants is, at best, incomplete and perhaps, flatly wrong. In point of fact, the securities become eligible for such services at the request of the issuer for the benefit of its shareholders when the issuer submits the representation letter. DTC's position that only "participants" can withdraw from its system completely ignores the "beneficiary" of the DTC system, i.e. shareholders of the issuer. And it is the shareholders' company through its board of directors, not participants/brokers, that is in the best position to assess the impact on such beneficiaries, and the company, of withdrawal from the DTC system. In fact, since participants own DTC, they are in a conflict of interest that should disqualify them from deciding or influencing withdrawal of a company and its shareholders from the DTC system.

Assuming federal and state securities law compliance, the conditions that must be met for the proper transfer of an issuer's securities are determined by, and are a question of, state corporate law and the certificate of incorporation and bylaws of the issuer. In the case of issuers whose securities are listed on a national securities exchange, there may be other requirements imposed by the exchange as a condition of listing. In the case of issuers with a large public float and substantial trading volume, there are practical considerations for entering and remaining within the DTC system. However, in the case of smaller companies with limited public float and small trading volume, the determination of what stock transfer system is in the best interest of the company and its shareholders should be left to a company's board of directors and shareholders as a matter of corporate law.

II. Policy Reasons for Opposition to Proposed Rule.

There is reason to believe that certain market participants make the "affirmative determination" that they can cover a short position based on the mere presence of shares held in street name by Cede and Co. as nominee of the Depository Trust Company ("DTC"). At best, certain market makers may contact DTC's participants, which have allocations of shares on the books of DTC, to borrow the shares that are being sold short from such participants. Such arrangements may occur without the consent or knowledge of the beneficial owners of these securities or the issuer. Thus, unintentionally and unwittingly, the DTC system of book-entry-only transactions facilitates the process of shortselling, particularly of small cap companies that are not listed on a national exchange. This problem is exacerbated exponentially by the fact that in contrast to national exchanges there are no mandatory close-out requirements for short sales on the OTCBB. See, e.g., NASD Rule 11830.

Rule 10(a)-1 does not cover securities traded on the OTCBB, such as FST. Consequently, as a matter of policy, smaller issuers should be able to withdraw from the DTC system so that they can individually monitor shortselling, and protect the long-term interests of their stockholders. Unlike the mandatory periodic reporting requirements on the national exchanges, determining a bulletin board company's short position held by any market participant is virtually impossible, absent litigation. Thus, withdrawal from the DTC is a way for these small companies to know and control their securities.

Withdrawal from DTC would entail taking stock out of street name and registering certificates in the name of beneficial owners, i.e., the shareholders. Certificates would be issued to and either held by the shareholder or kept on deposit with the shareholder's broker. When the shareholder wants to sell, it would tender and endorse the certificate to the broker. When a buyer is located, the certificate would be sent to the transfer agent of the company with instructions for issuance of a new certificate to the buyer.

While certificated-only transfer arrangements may be impractical for a large public company with substantial trading volume, advances in technology make it possible for most transfer agents to accommodate a certificated custody-only system for small companies. While this is not a failsafe against short selling, it does give the company a modicum of control and ability to know and track shareholders who buy for investment versus those who buy to speculate or to facilitate speculation.

The Commission obviously has a strong interest in insuring an orderly public trading market which avoids the "backroom problems" that plagued many brokers during the 1960's and early 1970's. However, there is an equally compelling interest in protecting against market manipulation of the type commonly encountered by smaller companies. See Question G of the Commission's Release No. 34-42037; File No. S7-24-99. The DTC system works against transparency in the marketplace that the Commission has strongly advocated. A certificated custody-only transfer system will permit small companies and their shareholders to protect their interest in the long term growth of the company by enabling them to verify their shareholders, determine the interest of those shareholders, and track the trading and changes in ownership of those shareholders on a regular basis. It is difficult to see any disadvantage to such an increase in transparency and, to the contrary, it would appear there would be many advantages to small companies, as well as the Commission, in increasing transparency in such a manner.

III. Conclusion.

The undersigned respectfully requests the Commission deny the proposed rule change of DTC. Instead, it is requested that the Commission renew consideration of the concerns contained in Question G of the aforementioned Release No. 34-42037. This is a growing problem that is plaguing small cap companies and is an impediment to capital formation, orderly markets, and a healthy growth environment for the smaller sector of the corporate markets.

Thank you for considering my comments.

Very truly yours,
Tobin, Carberry, O'Malley, Riley & Selinger, P.C.

By: /s/ Joseph J. Selinger
Joseph J. Selinger