

EDWARD L. PITTMAN

edward.pittman@dechert.com  
+1 202 261 3387 Direct  
+1 202 261 3333 Fax

**SEC**  
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Washington, DC  
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November 20, 2009

**VIA COURIER**

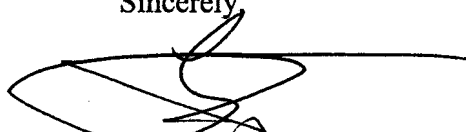
Ms. Elizabeth M. Murphy  
Secretary  
United States Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Re: SR-DTC-2006-16 – Reply of Petitioner

Dear Ms. Murphy:

Enclosed please find the Reply of Petitioner, the Securities Transfer Association, Inc., to the Response of the Depository Trust Company in the above-captioned matter.

Sincerely,



Edward L. Pittman

cc: James A. Brigagliano  
Jerry W. Carpenter  
Susan M. Petersen

Gregg M. Mashberg

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UNITED STATES SECURITIES AND EXCHANGE COMMISSION

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: Reply of Petitioner

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Re: Securities Exchange Act Rel. No. 34-60196 (June 30, 2009) : File No. SR-DTC-2006-16

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NOW COMES THE SECURITIES TRANSFER ASSOCIATION, INC., (“Petitioner” or “STA”), in reply to the response submitted by the Depository Trust Company (“Respondent” or “DTC”) dated October 15, 2009 (“Response”) in the above captioned matter.

**Background**

On August 4, 2009, the STA submitted a petition (the “Petition”) requesting that the U.S. Securities and Exchange Commission (the “SEC” or “Commission”), pursuant to Rule 430 of the Commission’s Rules of Practice, 17 C.F.R. § 201.430, review and set aside the action of the Division of Trading and Markets (the “Division” or “Staff”) approving by delegated authority a rule filing by DTC, as captioned above, pursuant to Section 19(b)(2) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. § 78s(b)(2) (the “Approval Order”).

STA is a trade association representing the interests of both bank and non-bank transfer agents. DTC is a registered clearing agency and self-regulatory organization registered under Section 17A of the Exchange Act that describes itself as “the nation’s principal securities depository.” The important issues addressed in the Petition arise in the context of a rule filing by the Respondent that sets forth standards that are applicable to all registered transfer agents seeking to participate in the Fast Automated Securities Transfer program (“FAST”) and the Direct Registration System (“DRS”) (the “Proposed Rules”). Participation in these programs is essential to the business operations of most registered transfer agents offering services to public companies that issue national market system securities.

The STA has reviewed carefully the Response. Because the Response raises significant issues, and to assure that Petitioner's comments are not mischaracterized, the STA has chosen to submit this Reply.

**Petitioner Does Not Agree With Substantive Terms of the Proposed Rules**

The Response suggests that the STA agrees with the substance of DTC's Proposed Rules, but simply wishes to engage in a "turf battle" over the proper regulator. The STA strongly disagrees with this characterization of the issues. The jurisdictional issues presented by the Proposed Rules are significant.

Commission review of the Approval Order is necessary because the Proposed Rules establish a *de facto* national standard for registered transfer agents, with DTC as the *de facto* self-regulatory organization for transfer agents. Congress did not choose to subject transfer agents to oversight by a self-regulatory organization, such as DTC. Transfer agents are not members of DTC. Nor are transfer agents afforded the same rights and benefits generally available to members of DTC. Congress intended the Commission, in collaboration with the appropriate bank regulators, to set the regulatory standards for transfer agents.

Although the STA agrees that the regulation of transfer agents needs to be modernized in certain of the areas addressed by the Approval Order, the STA does not agree that the terms of the Proposed Rules correctly address the issues. The Petition never suggests that the Proposed Rules are a correct articulation of appropriate standards. The Petition states that the Commission has the jurisdiction to develop standards for transfer agents and has already considered and developed substantive standards. Petitioner views other aspects of the Proposed Rules as inappropriately vague and imposing costs on small transfer agents that cannot be justified. By allowing DTC to propose what are effectively national standards, small transfer agents (who may comprise the majority of those transfer agents affected by the Proposed Rules) also are denied the benefit of the Regulatory Flexibility Act's requirements, including the opportunity to comment on less costly

alternatives to the Proposed Rules. Petitioner's comments on the Proposed Rules are a matter of record reflected in the public file.<sup>1</sup>

### **DTC May Not Arbitrarily Deny Access to Its Services**

Also in its Response, DTC asserts the following, which we believe deserves careful attention by the Commission:

DTC is not obligated to add any particular issue to the FAST programs and retains the right and discretion to perform all custody services itself. Similarly, transfer agents have no statutory or regulatory right to be accepted in the FAST program by DTC.

The STA agrees that DTC does not have an obligation to admit every transfer agent to its programs, but it is required by the Exchange Act to have standards and to provide a fair procedure for denying access to its services. The obligations imposed on self-regulatory organizations under the Exchange Act are greater than those of other regulated entities, including brokers, who may choose freely and without explanation whether or not to enter into a business relationship. DTC seems to have overlooked the language of Section 17A of the Exchange Act, which states in paragraph (b)(3)(H) that as part of receiving Commission approval to operate as a clearing agency, DTC's rules:

. . . in general, [must] provide a fair procedure with respect to the disciplining of participants, the denial of participation to any person seeking participation therein, *and the prohibition or limitation by the clearing agency of any person with respect to access to services offered by the clearing agency.* (emphasis added).

And, Paragraph (b)(5)(B) of Section 17A, which provides:

A determination by the clearing agency [such as DTC] to deny participation or prohibit or limit a person with respect to access to services offered by the clearing agency *shall be supported by a statement setting forth the specific grounds on which the denial or prohibition or limitation is based.* (emphasis added).

In fact, DTC has no disclosed standards that it applies in connection with a decision to admit either issuers or transfer agents to its programs. In the Proposed Rules, and in practice, DTC seems to reserve to itself complete discretion to admit or terminate a transfer agent's

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<sup>1</sup> The STA also strongly objects to DTC's characterization of the relationship between itself and transfer agents as being "custodial" in nature. This issue is addressed in the public comments submitted by STA.

participation in its programs. Petitioner believes that DTC routinely denies access to its services – for both transfer agents and issuers seeking FAST eligibility – without standards, explanation, notice, or fair procedures in contravention of the Exchange Act.<sup>2</sup>

Moreover, the STA does not believe that the Proposed Rules, which contain standards that are so amorphous as to be meaningless, are consistent with DTC’s obligation under the Exchange Act.<sup>3</sup> The “secret concerns” of DTC are not an appropriate standard. We note the following language from the U.S. Supreme Court’s decision in Silver v. New York Stock Exchange, 373 U.S. 341 (1963):

[N]o justification can be offered for self-regulation conducted without provision for some method of telling a protesting nonmember why a rule is being invoked, so as to harm him and allowing him to reply in explanation of his position. No policy reflected in the Securities Exchange Act is, to begin with, served by denial of notice and an opportunity for hearing.

Because entry into the FAST and DRS systems has become a threshold requirement for a large segment of the transfer agent industry to operate, the STA believes that the Commission should establish national standards that may be used by DTC in deciding to admit or deny access to these systems. A transfer agent that is in compliance with the Commission’s own standards should not be arbitrarily denied access to services offered by DTC that have become necessary to engage in business. DTC must have fair procedures, including timelines, to admit or deny access to its systems.

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<sup>2</sup> STA notes that DTC’s practice of routinely excluding small issuers from its programs restricts their ability to raise capital and is contrary to the Commission’s mandate under Section 17A of the Exchange Act to promote immobilization.

<sup>3</sup> By way of example, one of the minimum standards in the Proposed Rules, which deserves to be quoted exactly, states that transfer agents:

must follow all applicable rules under the Exchange Act and all other applicable federal and state laws, rules, and regulation, applicable to transfer agents.

## **DTC May Not Circumvent Commission Review of Its Practices**

We also want to highlight for the Commission's attention the following statement in the

Response:

DTC arguably was entitled to adopt the new standards simply in furtherance of the *commercial relationship* between DTC and the agents. That is, the standards could have been incorporated in the contract between the FAST agent and DTC. (emphasis supplied).

Despite its questionable content, in this instance DTC did submit a rule filing to the Commission for approval. However, often transfer agents are subject to DTC-imposed requirements and procedures that are not reviewed or approved by the Commission or its Staff. These requirements, which result in economic burdens for transfer agents, are simply announced unilaterally by DTC and are not subject to negotiation. Because of the "tremendous economic power" that DTC has been granted by Congress and the Commission, there is little recourse that transfer agents are afforded. The position of DTC is not one of a party negotiating in good faith, it is that of the nation's principal security depository saying "take it or leave it" in the context of a commercial relationship.

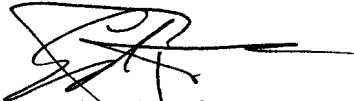
These "practices" of DTC, whether they are set forth in an adhesion contract, as a result of proclamation, or maintained internally, are subject to the procedural requirements that both Congress and the Commission have established under Section 19 of the Exchange Act. The STA believes that the culture and the practices of DTC reflected in the Response are problematic both in terms of the Exchange Act's requirements for procedural fairness, and federal and state antitrust laws. If DTC wishes to operate outside the structure of the Exchange Act, and to impose terms on transfer agents that are not subject to Commission review, then it and its members who

collaborate to impose those terms and conditions on transfer agents must do so in compliance with the state and federal antitrust laws.<sup>4</sup>

### Conclusion

The STA believes very strongly that the Approval Order is contrary to both law and public policy. The STA understands, based on recent public statements by its Staff, that the Commission may propose amendments to its own transfer agent regulations in the near future. We also encourage the Commission to require DTC to establish a formal process for admitting or denying access to its services based on substantive standards reflected in the Commission's own rules.

Respectfully submitted on behalf of the Petitioner, by



Edward J. Pittman, Esq.  
Dechert LLP

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<sup>4</sup> The Supreme Court recently stated in Credit Suisse Securities (USA) LLC v Billing, 551 U.S. 264 (2007), that the standard for determining whether an organization, such as DTC, would be immune from the antitrust laws is whether the organization was subject to regulation and oversight under the federal securities laws. In particular, we note that two of the factors considered by the Court are (1) the existence of regulatory authority under the securities law to supervise the activities in question; and (2) evidence that the responsible regulatory entities exercise that authority. *See also, e.g., Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975); and, United States v. National Ass'n of Securities Dealers, Inc., 422 U.S. 694 (1995). If DTC's standards are simply imposed by contract or proclamation, and are not reviewed by the Commission, then we do not believe they are subject to any immunity from the antitrust laws. Similarly, if DTC chooses to arbitrarily deny nonmembers access to its services without a fair process, subject to oversight by the Commission, then we believe those actions also are not immune. *Cf. Silver v. New York Stock Exchange*, cited *supra*, (The Court held that the federal securities laws did not preclude application of the antitrust laws to the extent that the New York Stock Exchange engaged in collective action and denied access to its services without redress through fair procedures).