

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59384; File No. SR-DTC-2008-13)

February 11, 2009

Self-Regulatory Organizations; The Depository Trust Company; Order Approving a Proposed Rule Change 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

I. Introduction

On October 9, 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 December 17, 2008, the Commission published notice of the proposed rule change in the Federal Register to solicit comments from interested persons.² The Commission received no comment letters in response to the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description

Prior to this rule change, Rule 144A securities,³ other than Investment Grade Securities, were eligible for DTC’s deposit, book-entry delivery, and other depository services provided, in part, that such securities were included in an “SRO Rule 144A System” (frequently referred to as the “SRO Requirement”), such as the NASD’s PORTAL Market System.⁴

¹ 15 U.S.C. 78s(b)(1).

² Securities Exchange Act Release No. 59088 (Dec. 11, 2008), 73 FR 76688.

³ Rule 144A, 17 CFR 230.144A, 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), 17 CFR 230.144A(d)(2), requires that the seller and 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.

⁴ 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 that Commission order as

Under this rule change, DTC will eliminate the SRO Requirement thereby resulting in a uniform procedure for making all Rule 144A Securities DTC-eligible. Issuers and participants will continue to be responsible for determining that their deposit of Rule 144A Securities at DTC and their transactions in Rule 144A Securities through DTC's facilities are in compliance with existing DTC rules and the federal securities laws,⁵ 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

nonconvertible debt securities and nonconvertible preferred stock which are in one of the top four categories by a nationally recognized statistical rating organization.

⁵ 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.

self-regulatory organizations (as defined under the Securities Exchange Act of 1934); or (6) any other local, state, federal, or foreign laws or regulations there under.” 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 appeared prior to this rule change except that the reference to the SRO Requirement will be deleted.

III. 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,⁶ which requires that the rules of a registered clearing agency are designed to, among other things, remove impediments to the perfection of the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions.

When DTC established the SRO Requirement as a condition of eligibility for Rule 144A Securities, DTC and the Commission envisioned that an SRO Rule 144A System would provide comprehensive safeguards to facilitate the SRO’s ability to monitor compliance with Rule 144A. However, the only SRO Rule 144A System that was developed was the NASD’s PORTAL Market System (“PORTAL”). Additionally, PORTAL neither developed as anticipated nor

⁶ 15 U.S.C. 78q-1(b)(3)(F).

included the safeguards contemplated by the DTC requirement.⁷ Thus, the Commission agrees with DTC that the SRO Requirement is no longer necessary or practical to achieve the purpose for which it was added to DTC's rules. In addition, the requirement appears to deter the development of alternative markets for Rule 144A Securities that could avail traders in 144A Securities of DTC's automated clearance, settlement, and risk management services.⁸ Accordingly, DTC's removal of the SRO Requirement should expand the number of restricted securities that can become eligible for DTC's clearance and settlement services thus helping to perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions, which is consistent with Section 17A(b)(3)(F) of the Act.

IV. 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.

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

⁸ In a 2007 order approving Nasdaq's reestablishment of its PORTAL market, the Commission acknowledged comments suggesting such and encouraged DTC to review its SRO Requirement. Supra note 7.

⁹ 15 U.S.C. 78q-1.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁰ that the proposed rule change (File No. SR-DTC-2008-13) be and hereby is approved.¹¹

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

Florence E. Harmon
Deputy Secretary

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).