

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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. 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 Number SR-ISE-2011-78 and should be submitted on or before January 3, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

**Kevin M. O'Neill,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65901; File No. SR-DTC-2011-10]

### Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rules Relating to Existing Operational Arrangements Involving Eligibility of Securities

December 6, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on November 25, 2011, The Depository Trust Company ("DTC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change described in Items I and II below, which items have been prepared primarily by DTC. DTC filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) and Rule 19b-4(f)(4) thereunder so that the proposed rule change was effective upon filing

with the Commission.<sup>2</sup> The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

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

The purpose of this proposed rule change is to update the existing contractual operational arrangements necessary for a securities issue to become and remain eligible for the services at DTC.<sup>3</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 these statements.<sup>4</sup>

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

###### (1) Purpose

DTC's operational arrangement ("Operational Arrangement" or "OA") was first published in June 1987 and subsequently updated in June 1988, February 1992, December 1994, January 1998, May 2002, and most recently in January 2009.<sup>5</sup> The OA is designed to maximize the number of issues of securities that may be made eligible for DTC services and to provide for the orderly processing of such securities and the timely payments to DTC participants. DTC's experience demonstrates that when participants,

issuers, underwriters, agents (as such terms are defined in the DTC rules or in the OA), and their counsel are aware of DTC's requirements, those requirements may be more readily met. DTC is now proposing to update the OA to clarify DTC's processes and to mitigate certain risk associated with those processes. Additionally, DTC is proposing to make several ministerial changes, including changes related to methods of notification, and to add clarifying language to provide a more concise description of OA procedures.

The primary differences between the proposed amended OA and the OA as filed with the Commission in 2009 are as follows:

1. Matters that were previously the subject of proposed rule change filings with the Commission but were never incorporated into the OA:

a. In March 2010, DTC filed with the Commission a proposed rule change modifying the required notification method for the assumption or termination of transfer agent services.<sup>6</sup> DTC is now proposing to update the OA to reflect those methods for notifying DTC of transfer agency changes.

b. In May 2010, DTC filed with the Commission a proposed rule change updating DTC procedures regarding the Participant Tender Offer Program in order to provide DTC participants with a more efficient process for making elections regarding corporate action events which DTC deemed appropriate for processing.<sup>7</sup> DTC is now proposing to update the OA to reflect that process.

c. In November 2010, DTC filed with the Commission a proposed rule change to automate the approval process relating to providing trustee access to the Security Position Report Service at the point of eligibility.<sup>8</sup> DTC is now proposing to update the OA to reflect that process.

d. In April 2011, the Commission approved a DTC proposed rule change amending the requirements for transfer agents to maintain a balance certificate in the Fast Automated Securities Transfer Program ("FAST").<sup>9</sup> DTC is now proposing to update the OA to specify that transfer agents participating in FAST that act for issues participating in the Direct Registration System no

<sup>2</sup> 15 U.S.C. 78s(b)(3)(A)(iii) and 17 CFR 240.19b-4(f)(4).

<sup>3</sup> The text of the proposed rule change is attached as Exhibit 5 to DTC's filing, which is available at [http://www.dtcc.com/downloads/legal/rule\\_filings/2011/dtc/2011-10.pdf](http://www.dtcc.com/downloads/legal/rule_filings/2011/dtc/2011-10.pdf).

<sup>4</sup> The Commission has modified the text of the summaries prepared by NSCC.

<sup>5</sup> Securities Exchange Act Release 24818 (August 19, 1987), 52 FR 31833 (August 24, 1987) (File No. SR-DTC-87-10); 25948 (July 27, 1988), 53 FR 29294 (August 3, 1988) (File No. SR-DTC-88-13); 30625 (April 30, 1992), 57 FR 18534 (April 30, 1992) (File No. SR-DTC-92-06); 35342 (February 8, 1995), 60 FR 8434 (February 14, 1995) (File No. SR-DTC-94-19); 39894 (April 21, 1998), 63 FR 23310 (April 28, 1998) (File No. SR-DTC-97-23); 45994 (May 29, 2002), 68 FR 35037 (June 11, 2003) (File No. SR-DTC-2002-02); 59199 (January 6, 2009), 74 FR 1266 (January 12, 2009) (File No. SR-DTC-2008-14).

<sup>6</sup> Securities Exchange Act No. 61620 (March 1, 2010) 75 FR 10539 (March 8, 2010) (File No. SR-DTC-2010-04).

<sup>7</sup> For Securities Exchange Act Release No. 62119 (May 18, 2010) 75 FR 29374 (May 25, 2010) (File No. SR-DTC-2010-08).

<sup>8</sup> Securities Exchange Act No. 63245 (November 4, 2010) 75 FR 69150 (November 10, 2010) (File No. SR-DTC-2010-10).

<sup>9</sup> Securities Exchange Act Release No. 64191 (April 5, 2011), 76 FR 20061 (April 11, 2011) (File No. SR-DTC-2010-15).

<sup>10</sup> 17 CFR 200.30-3(a)(12).

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

longer need to maintain a balance certificate.

e. In August 2011, the Commission approved a DTC proposed rule change relating to processing early redemptions of certain certificates of deposit.<sup>10</sup> DTC is now proposing to update the OA to reflect those changes.

2. In January 2011, DTC published an Important Notice to provide issuers and their transfer agents guidance on key criteria and processes applicable to eligibility for book-entry delivery and depository services.<sup>11</sup> DTC is now proposing to update the OA in order to be consistent with the Important Notice and to clarify DTC's eligibility process.

3. For purposes of consistency, DTC is proposing to include an Important Legal Information Section in the OA, which adopts language from current DTC's Rules and Procedures.

4. The following processes in order to mitigate risk associated with processing:

a. DTC is proposing to require an issuer or its transfer agent obtain a new CUSIP number from Standard & Poor's CUSIP Service Bureau in order to facilitate the adequate processing of a corporate action event, such as an interest payment. This change should reduce the number of processing problems associated with corporate.

b. DTC is proposing to add language to the OA to establish that the record date for equity securities must coincide with the established ex-date announced by the applicable stock exchange on which the security is listed.

Additionally, DTC is proposing to require that if a security is listed on an exchange or trading in the secondary market, the issuer must distribute a shareholder notice to the respective exchange that announces the issuer's intent to effect a corporate action. These changes are consistent with current practice and should help mitigate risk associated with corporate actions.

c. DTC is proposing to update the OA to require that agents send payments of less than \$1 billion in same-day funds no later than 1 p.m. eastern time and to send payments of \$1 billion or more in same day funds no later than 12 p.m. eastern time in order to facilitate the timely processing of payments. This change reflects the current industry practice relating to reorganization payments.

d. DTC is proposing to require issuer and their agents to annually certify that

their bank account numbers on DTC's records are accurate.

e. DTC is proposing to codify established practice of requiring the issuer or agent to provide DTC a notice of reduction in the stock distribution or dividend amount due DTC as a result of the reduction of treasury or repurchased shares (*i.e.*, an issuer "buy back") held on deposit by DTC on record date. As proposed, the issuer or agent will be required to provide specified information together with the participant or participants' confirmation letters preferable five business days but no fewer than three business days prior to the payable date for that security. Failure of a participant to comply with notification to DTC to effect timely adjustments to the participant's accounts could jeopardize the same-day distribution of payments to the participant and beneficial owners holding through it. DTC is also proposing to add a disincentive fee for participants that submit instructions to DTC outside of the established timeframes.

5. DTC is proposing to include corrections and clarifications in the OA relating to corporate action notification and processing requirements. These changes reflect current practice with agents and include requirements for what needs to be provided to DTC in the event that the terms of an offer are amended.

## (2) Statutory Basis

The proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to DTC because it should facilitate the prompt and accurate clearance and settlement of securities transactions by clarifying provisions in the DTC's OA pertaining to existing eligibility requirements and processes. In so doing, these clarifications should in turn expedite the process of making securities eligible for DTC services and reduce risk associated with processing corporate reorganization events.

## (B) Self-Regulatory Organization's Statement on Burden on Competition

DTC does not believe that the proposed rule change would impose any burden on competition.

## (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 been solicited DTC.

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

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>12</sup> and Rule 19b-4(f)(4)<sup>13</sup> thereunder because it is a change in an existing service that does not adversely affect the safeguarding of securities or funds in the custody or control of the clearing agency and does not significantly affect the respective rights or obligations of the clearing agency or persons using the service. At any time within sixty days of the filing of such rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-DTC-2011-10 on the subject line.

### Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submission should refer to File Number SR-DTC-2011-10. This file number should be included on the subject line if email 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

<sup>10</sup> Securities Exchange Act Release Numbers 64864 (July 12, 2011) 76 FR 42149 (July 18, 2011) (File No. SR-DTC-11-06).

<sup>11</sup> DTC Important Notice B#0006-11 available at [http://www.dtcc.com/downloads/legal/imp\\_notices/2011/dtc/set/0006-11.pdf](http://www.dtcc.com/downloads/legal/imp_notices/2011/dtc/set/0006-11.pdf).

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>13</sup> 17 CFR 240.19b-4(f)(4).

those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549-1090, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filings will also be available for inspection and copying at the principal office of NSCC and on NSCC's Web site at [http://www.dtcc.com/downloads/legal/rule\\_filings/2011/dtc/2011-10.pdf](http://www.dtcc.com/downloads/legal/rule_filings/2011/dtc/2011-10.pdf). 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 Number SR-DTC-2011-10 and should be submitted on or before January 3, 2012.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

Kevin M. O'Neill,

Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65896; File No. SR-FINRA-2011-067]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to Whistleblower Claims in Arbitration

December 6, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 21, 2011, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. 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

FINRA is proposing to amend FINRA Rule 13201 of the Code of Arbitration

Procedure for Industry Disputes ("Industry Code") to align the rule with statutes that invalidate predispute arbitration agreements for whistleblower claims. The proposed rule change also would make a conforming amendment to FINRA Rule 2263.

The text of the proposed rule change is available on FINRA's Web site at <http://www.finra.org>, at the principal office of FINRA and at the Commission's Public Reference Room.

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

In its filing with the Commission, FINRA 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. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

###### 1. Purpose

The proposed rule change would amend FINRA Rule 13201 (Statutory Employment Discrimination Claims) of the Industry Code, and FINRA Rule 2263 (Arbitration Disclosure to Associated Persons Signing or Acknowledging Form U4), to align the rules with statutes that invalidate predispute arbitration agreements for whistleblower claims.

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")<sup>3</sup> amended the Sarbanes-Oxley Act of 2002 ("SOX") by adding a new paragraph (e) to 18 U.S.C. 1514A<sup>4</sup> to provide that:

(1) WAIVER OF RIGHTS AND REMEDIES—The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.

(2) PREDISPUTE ARBITRATION AGREEMENTS—No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

<sup>3</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, § 919 (2010).

<sup>4</sup> See Dodd-Frank Section 922(c)(2), adding 18 U.S.C. 1514A(e) (Nonenforceability of Certain Provisions Waiving Rights and Remedies or Requiring Arbitration of Disputes).

Prior to the Dodd-Frank Act, it was FINRA staff's articulated position that parties were required to arbitrate SOX whistleblower claims under the Industry Code.<sup>5</sup>

In light of the changes set forth in the Dodd-Frank Act that invalidate predispute arbitration agreements in the case of SOX whistleblower claims, the proposed rule change would amend FINRA Rule 13201 of the Industry Code to make clear that parties are *not* required to arbitrate SOX whistleblower claims, superseding the existing guidance to the contrary. While the main impetus for the proposed rule change is the need to update FINRA staff's stated position on SOX whistleblower claims, FINRA proposes to make the rule text broad enough to cover any statutes that prohibit predispute arbitration agreements for whistleblower claims.<sup>6</sup>

Rule 13201 of the Industry Code currently provides that a claim alleging employment discrimination, including sexual harassment, in violation of a statute, is not required to be arbitrated under the Industry Code. Such a claim may be arbitrated only if the parties have agreed to arbitrate it, either before or after the dispute arose. The proposed rule change would amend Rule 13201 to add a new provision to provide that a dispute arising under a whistleblower statute that prohibits the use of predispute arbitration agreements is not required to be arbitrated under the Industry Code. The rule would state that such a dispute may be arbitrated only if the parties have agreed to arbitrate it after the dispute arose.

FINRA also would amend the title of Rule 13201 to reflect the addition of the new provision relating to whistleblower claims. FINRA structured the proposed rule change to separate the provision relating to statutory employment discrimination claims from the provision relating to whistleblower claims. While parties may agree to arbitrate a statutory employment discrimination claim either before or after a dispute arises, the Dodd-Frank Act invalidates predispute agreements to arbitrate certain whistleblower claims.

The proposed rule change also would make a conforming amendment to FINRA Rule 2263, which requires firms

<sup>5</sup> See *Arbitrability of Sarbanes-Oxley Whistleblower Claims* by Laurence S. Moy, Pearl Zuchlewski, Linda A. Neilan and Katherine Blostein, *The Neutral Corner* (Volume 1—2008).

<sup>6</sup> The Dodd-Frank Act also invalidated predispute arbitration agreements in other whistleblower statutes, including, for example, 7 USC § 26(n) relating to Commodity Exchange Whistleblower Incentives and Protections.

<sup>14</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> 17 CFR 240.19b-4.