

reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Description

Recently a number of issuers of securities have independently requested that DTC withdraw from the depository all securities issued by them.⁴

Kennedy (March 8, 2003); Will Kernen (March 8, 2003); Patrick Kirby, Director, Salomon Smith Barney (March 14, 2003); Donald D. Kittell, Executive Vice President, Securities Industry Association (March 11, 2003); Jeremy D. Kraus, Valesc Medical Specialists (March 4, 2003); Philip Lanz, Managing Director, Bear, Stearns Securities Corp. (April 11, 2003); Arthur Lee, Vice President, Banc of America Securities LLC (March 18, 2003); Joseph M. Liguori, Vice President, JP Morgan Securities, Inc. (April 14, 2003); Erick Lihme (March 8, 2003); Luiz Lima, Director, Americas Regional Service Center, Citibank North America, Inc. (April 22, 2003); Lori Livingston, President and Chief Operating Officer, Transfer Online, Inc. (March 5, 2003); Richard Mangiarelli, President and Chief Operating Officer, Cybertel Communications Corporations (March 5, 2003); John Masse, Executive Director, Morgan Stanley (May 21, 2003); Thomas J. Mazzarisi, Executive Vice President and General Counsel, JAG Media Holdings, Inc. (March 14, 2003); Joseph Meuse (March 5, 2003); Michael Moran, First Vice President, National Investor Services Corp. (March 11, 2003); Lawrence Morillo, Managing Director, Pershing LLC (April 3, 2003); John O'Brien (March 11, 2003); Thomas J. O'Hara, Department Leader, Edward Jones (April 15, 2003); John M. Osmanski (March 4, 2003); David E. Patch (March 4, 2003); Dave Patch (March 6, 2003); D. Patch (March 15, 2003); John L. Petersen, Esq., Petersen & Fefer, on behalf of Blue Industries, Inc. (March 12, 2003); Ernest A. Pittarelli, USB Warburg LLC (April 24, 2003); Robert M. Post (March 8, 2003); James E. Pratt, Esq., on behalf of Composite Holdings, Inc. (March 27, 2003); Joe Raia (March 11, 2003); Richard Reincke, Chief Operating Officer, Aegis Assessments, Inc. (March 3, 2003); Peter Richardson (March 8, 2003); John Rideout (March 12, 2003); Rodney J. Roncaglio (April 29, 2003); Robert S. Rondeau (May 20, 2003); Greg Rotman (March 14, 2003); David Salk (March 6, 2003); Henry F. Schlueter, Esq., Schlueter & Associates, P.C. (March 12, 2003); Robert J. Scott, President and Chief Operating Officer, The Auxer Group, Inc. (March 20, 2003); Joseph J. Selinger, Esq., Tobin, Carberry, O'Malley, Riley & Selinger, P.C. (March 14, 2003); Marshal Shichtman, Esq., Marshal Shichtman & Associates, P.C. (March 11, 2003); Scott Sieck (March 5, 2003); Steven Simonyi-Gindele, President and Chief Executive Officer, ID Superstore (March 17, 2003); Maurisa Sommerfeld, Executive Vice President, Charles Schwab & Co., Inc. (April 15, 2003); Michael Sondow (March 4, 2003); Chris Spencer, Chief Executive Officer, Wizzard Software Corporation (March 11, 2003); Roger J. Steffensen (March 8, 2003); SuperVP (March 20, 2003); Kristie Thompson, President, SIA Customer Account Transfer Division (April 4, 2003); Larry E. Thompson, Managing Director and Deputy Chief Counsel, The Depository Trust Company (March 27, 2003); Leon Urbaitel, Chief Operating Officer, StockTransfer.com (March 6, 2003); Brian Urkowitz, Merrill Lynch (April 23, 2003); C. Michael Viviano, BNY Clearing (April 4, 2003); Geoffrey F. Walsh, Chief Operating Officer, Solution Capital (March 7, 2003); and William J. Winter, Senior Vice President, A.G. Edwards & Sons, Inc. (March 14, 2003).

⁴ As explained in further detail by many of the commenters opposing DTC's proposal, the issuers making these requests have alleged that their securities have been the target of manipulative short sellers.

Generally, these issuers have also advised DTC that they will not allow their securities to be reregistered in the name of DTC or its nominee, Cede & Co. The securities of these issuers generally became eligible for DTC services at the request of DTC's participants so that they could utilize DTC's services, including its book-entry transfer system. The securities are held by DTC in its nominee name for the benefit of its participants. DTC has stated that, in its opinion, these issuers have no legal or beneficial interest in the securities they are requesting to be withdrawn from DTC.

DTC's current rules and procedures provide for participants to submit withdrawal requests if they wish to withdraw their securities from DTC.⁵ However, DTC's current rules and procedures do not provide for DTC to comply with a withdrawal request from an issuer without also receiving instructions from its participants.

DTC's proposed rule change provides that upon receipt of a withdrawal request from an issuer, DTC will take the following actions: (1) DTC will issue an Important Notice notifying its participants of the receipt of the withdrawal request from the issuer and reminding participants that they can utilize DTC's withdrawal procedures if they wish to withdraw their securities from DTC; and (2) DTC will process withdrawal requests submitted by participants in the ordinary course of business but will not effectuate withdrawals based upon a request from the issuer.

DTC stated in its filing that the application of its procedures is not affected by any purported approval of the request by the shareholders or board of directors of the issuer.⁶

III. Comment Letters

The Commission received 89 comment letters regarding the proposed rule change.⁷ Forty-seven commenters submitted fifty-two comment letters opposing the proposed rule change.⁸

⁵ See, e.g., Rules 2, 6, 9(A), and 9(B) of DTC's Rules.

⁶ DTC's current procedures and this proposed rule filing do not apply to withdrawal requests submitted by issuers in situations where an issue which should not have been made eligible and deposited at DTC was inadvertently made eligible and deposited (e.g., securities restricted pursuant to Rule 144 or Rule 145 under the Securities Act of 1933). In such situations, DTC will continue its practice of working with the issuer and its participants to exit the security from DTC.

⁷ *Supra* note 3.

⁸ Letters from Aegis Assessments, Inc., H. Glenn Bagwell, Bruce Barrett, Bruce M. Barrett, Cristy Barrett, Jake Barrett, Blue Industries, Inc., Leonard W. Burningham (three letters), Composite Holdings, Inc., Kevin Cundy, Cybertel Communications

Thirty-five commenters submitted thirty-six comment letters supporting the proposed rule change.⁹ DTC submitted a letter in response to certain issues raised by comment letters opposing the rule change.

A. Comment Letters Opposing DTC's Proposed Rule Change

A majority of the forty-seven commenters opposed to DTC's filing believe that approval of the proposed rule change would allow DTC to continue to facilitate, either directly or indirectly, short selling in the over-the-counter securities market in violation of DTC's obligation to promote the prompt and accurate clearance and settlement of securities transactions.¹⁰ Seven of these commenters characterized DTC's current settlement process as aiding and abetting illegal short selling or as creating an environment that permits unregistered securities offerings.¹¹

At least twenty-six commenters contended that an issuer should have a

Corporations, Dennis DeJose, Patricia Dowd Inc., Paul A. Ebeling, James Hendricks, Joseph Hoofnagle, Jr., Gordon D. House, ID Superstore, James Barclay Alan Inc., Jack Kennedy, Will Kernen, Erick Lihme, JAG Media Holdings, Inc., Medinah Minerals Inc., Joseph Meuse, John O'Brien, John M. Osmanski, David E. Patch, Dave Patch, David Patch, Robert M. Post, Joseph Raia, Peter Richardson, Rodney J. Roncaglio, Robert S. Rondeau, Greg Rotman, David Salk, Henry F. Schlueter, Robert J. Scott, Joseph J. Selinger, Marshal Shichtman, Scott Sieck, Solution Capital, Michael Sondow, Roger J. Steffenson, StockTransfer.com, SuperVP, Transfer Online, Inc., Valesc Medical Specialists, and Wizzard Software Corporation.

⁹ Letters from A.G. Edwards & Sons, Inc., Ameritrade, Inc., Banc of America Securities LLC, Bank Depository User Group, BNY Clearing, Cashiers' Association of Wall Street, Inc., Mark Cashion, Charles Schwab & Co., Inc., Citibank North America, Inc., Credit Suisse First Boston LLC, Edward Jones, First Clearing Corporation, Goldman, Sachs & Co., Ingalls & Snyder LLC, ING Financial Markets LLC, JP Morgan Securities, Inc., Merrill Lynch, Mizuho Trust & Banking Co. (USA), Morgan Stanley, National City Bank, National Financial Services LLC, National Investor Services Corp., Pershing LLC, Prudential Securities Incorporated, Raymond James and Associates, RBC Dain Rauscher, John Rideout, Salomon Smith Barney, Securities Industry Association, Securities Industry Association Customer Account Transfer Division, Spear, Leeds & Kellogg, State Street Corporation, Stearns Securities Corp., Sterne, Agee & Leach, Inc., Union Planters Trust & Investment Group, and USB Warburg LLC.

¹⁰ In addition to alleging that DTC facilitates abusive short selling, some of these commenters took issue with the Commission's regulation of DTC, broker-dealers, and other entities that the commenters believe are responsible for the problems associated with naked short selling.

¹¹ Several of these commenters characterized the imbalance between the number of shares trading through short selling and the number of shares outstanding as an unregistered securities offering. Others characterized this imbalance as "counterfeiting securities." Letters from H. Glenn Bagwell, Blue Industries, Inc., James Henricks, ID Superstore, Scott Sieck, Solution Capital, and Michael Sondow.