

processor, subject to the conditions specified in this order.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁷²

Florence E. Harmon,
Acting Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59148; File No. SR-DTC-2008-12]

Self-Regulatory Organizations; The Depository Trust Company; Order Approving Proposed Rule Change As Amended To Increase Liquidity Resources

December 23, 2008.

I. Introduction

On August 26, 2008, The Depository Trust Company ("DTC") filed with the Securities and Exchange Commission ("Commission") and on September 9, 2008, and on September 30, 2008, amended proposed rule change SR-DTC-2008-12 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").¹ Notice of the proposal was published in the **Federal Register** on October 21, 2008.² The Commission received no comment letters. For the reasons discussed below, the Commission is approving the proposed rule change, as amended.

II. Description

The proposed rule change seeks to increase the liquidity resources of DTC to ensure it has sufficient liquidity to cover the failure of a financial family of affiliated DTC Participants ("Affiliated Family").³ An Affiliated Family means a Participant that controls another Participant or other Participants and each Participant that is under the control of the controlling Participant. For purposes of this definition, "control" means the direct or indirect ownership of more than 50% of the voting securities or other voting interests of an entity.⁴

To ensure that DTC is able to complete its settlement obligations each day in the event of a Participant's inability to settle with DTC, DTC currently maintains liquidity resources of \$2.5 billion composed of a \$600 million all-cash Participants Fund and a committed line of credit in the amount of \$1.9 billion with a consortium of banks. DTC's committed line of credit was recently increased from \$1.4 billion. Given that financial firms have become increasingly interdependent, DTC recognizes that there is a possibility of "contagion" among several related Participants. Financial problems at one Participant may impact the stability of another related Participant, potentially causing both to fail simultaneously. Because of concerns about this potential, DTC and its regulators have agreed that DTC should increase its available liquidity resources so that DTC would be able to withstand the failure of a financial family of affiliated DTC Participants.⁵ To do so, DTC will (i) increase by \$700 million the total cash deposits to DTC's all-cash Participants Fund so that the aggregate amount of the required cash deposits to DTC's Participant Fund plus the required preferred stock investments of Participants will be increased to \$1.3 billion from \$600 million and (ii) limit the aggregate maximum net debit cap⁶ for any Affiliated Family to \$3 billion.

The following variables are currently used in the determination of each Participant's required Participant's Fund deposit:

(1) The six largest intraday net debit peaks for a Participant over a rolling 60-business day period.

(2) Minimum Fund Deposit: \$10,000.

(3) Fund Size: \$600 Million.

DTC will continue to employ these variables to calculate the first \$600 million of the required \$1.3 billion Fund. The remaining \$700 million will be allocated proportionately among the Affiliated Families whose aggregate net

debit caps per family exceed \$2.3 billion.⁷ An Affiliated Family whose net debit cap exceeds \$2.3 billion would be required to contribute a portion of the remaining \$700 million calculated by dividing the amount by which the Affiliated Family's net debit cap exceeds \$2.3 billion by the sum of the amounts by which each Affiliated Family's net debit cap exceeds \$2.3 billion.⁸ Once an Affiliated Family's additional Participant's Fund requirement has been established, DTC will allocate this sum among the Participants comprising the Affiliated Family in proportion to each Participant's adjusted net debit cap.⁹ This algorithm will be systematically used to calculate the allocations for the Participants of each Affiliated Family, unless each of the Participants that comprise an Affiliated Family provides DTC with written instructions to allocate the aggregate net debit cap differently. While the Participants of an Affiliated Family may give instructions to reapportion their net debit caps among themselves, they cannot reallocate to any one Participant a debit cap that is greater than the DTC system calculated net debit cap for that Participant.

III. Discussion

Section 19(b) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to assure the safeguarding of securities and funds in DTC's custody or control or for which it is responsible.¹⁰ The Commission believes that DTC's rule change is consistent with this Section because it should help assure the safeguarding of securities and funds in DTC's custody or

⁵ The Commission is the primary federal regulator of DTC as a clearing agency. DTC is also a limited purpose trust company established under New York Banking Law and a state member bank of the Federal Reserve System. As such, the The Federal Reserve Bank of New York (FRBNY) and the New York State Department of Banking also have regulatory authority over DTC.

⁶ In order to ensure that timely settlement can be completed in the event of a failure to settle by the Participant with the largest settlement obligation, DTC by sets debit limits (called net debit caps) for each Participant. A Participant's net debit is limited throughout the processing day to a net debit cap that is the lesser of four amounts: (1) An amount based on the average of the three largest net debits that the Participant incurred over a rolling 70 business day period, (2) an amount, if any, determined by the Participant's settling bank, (3) an amount, if any, determined by DTC, or (4) \$1.8 billion.

⁷ This amount is based on DTC's practice of maintaining a liquidity cushion of \$200 million between its largest net debit cap and its liquidity resources (i.e., DTC's current liquidity of \$2.5 billion minus the \$200 liquidity cushion it maintains).

⁸ DTC will adjust the net debit caps of the Participants that comprise an Affiliated Family so that the aggregate affiliated net debit cap does not exceed \$3 billion. Currently 18 Affiliate Families consisting of 57 DTC Participants will be subject to these Affiliated Family provisions. Thirteen Affiliated Families will be required to reduce their overall Net debit caps.

⁹ The proposed DTC Affiliated Family Algorithm can be viewed on the Commission's Web site at <http://www.sec.gov/rules/sro/dtc/2008/34-58757.pdf> and at DTC's Web site at http://www.dtcc.com/downloads/legal/rule_filings/2008/dtc/2008-12.pdf.

¹⁰ 15 U.S.C. 78q-1(b)(3)(F).

¹⁷² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² Securities Exchange Act Release No. 58757A (October 14, 2008), 73 FR 62578.

³ DTC currently has 332 Participants, most of which are broker-dealers or banks with one Participant account. Large integrated organizations, however, typically have several "legal entities" with each being DTC Participants (e.g., a bank custodian entity and a separate securities firm entity).

⁴ Under this definition, DTC currently has 47 Affiliated Families.

control or for which it is responsible by increasing DTC's liquidity resources to enable it to complete settlement in the event of a failure of a financial family of affiliated Participants.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder. In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR-DTC-2008-12), as amended, be and hereby is approved.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.¹¹

Florence E. Harmon,
Acting Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59138; File No. SR-FINRA-2008-064]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Proposed Rule Change To Amend NASD Interpretive Material (IM) 2110-2 (Trading Ahead of Customer Limit Order)

December 22, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 17, 2008, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) 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 NASD Interpretive Material (IM) 2110-2 (Trading Ahead of Customer Limit Order) to provide that, for the purpose of determining the minimum price improvement obligation where there is no published current inside spread, members may calculate a current inside spread by contacting and obtaining priced quotations from at least two unaffiliated dealers.

The text of the proposed rule change is attached as Exhibit 5.³

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

NASD IM-2110-2 (commonly referred to as the "Manning Rule") generally prohibits a member from trading for its own account at prices that would satisfy a customer's limit order unless the member immediately thereafter executes the customer limit order at the price at which it traded for its own account or at a better price. The legal underpinnings for IM-2110-2 are a firm's basic fiduciary obligations under agency law and the requirement that it must, in the conduct of its business, "observe high standards of commercial honor and just and equitable principles of trade."

On September 12, 2008, the SEC approved amendments to the minimum price-improvement standards in IM-2110-2 to provide tiered standards that vary according to the price of the customer limit order.⁴ The amendments

became effective on November 11, 2008.⁵ Revised NASD IM-2110-2 prescribes detailed minimum levels of price improvement that a member must provide in order to trade ahead of an unexecuted customer limit order without triggering the protections provided by the rule. In other words, the price-improvement standards in IM-2110-2 set forth the minimum amount by which a member must trade, in addition to the price of the customer buy limit order (or less than the price of a customer sell order), to avoid triggering the protections provided by IM-2110-2.

The minimum price improvement tiers are as follows:

(1) For customer limit orders priced greater than or equal to \$1.00, the minimum amount of price improvement required is \$0.01 for NMS stocks and the lesser of \$0.01 or one-half (1/2) of the current inside spread for OTC equity securities;

(2) For customer limit orders priced greater than or equal to \$.01 and less than \$1.00, the minimum amount of price improvement required is the lesser of \$0.01 or one-half (1/2) of the current inside spread;

(3) For customer limit orders priced less than \$.01 but greater than or equal to \$0.001, the minimum amount of price improvement required is the lesser of \$0.001 or one-half (1/2) of the current inside spread;

(4) For customer limit orders priced less than \$.001 but greater than or equal to \$0.0001, the minimum amount of price improvement required is the lesser of \$0.0001 or one-half (1/2) of the current inside spread;

(5) For customer limit orders priced less than \$.0001 but greater than or equal to \$0.00001, the minimum amount of price improvement required is the lesser of \$0.00001 or one-half (1/2) of the current inside spread;

(6) For customer limit orders priced less than \$.00001, the minimum amount of price improvement required is the lesser of \$0.000001 or one-half (1/2) of the current inside spread; and

(7) For customer limit orders priced outside the best inside market, the minimum amount of price improvement required must either meet the requirements set forth above or the member must trade at a price at or inside the best inside market for the security.

Therefore, if a firm is holding a customer limit order to buy priced at \$.75 and the applicable minimum price improvement standard is \$.01, the firm would be permitted to buy at \$.76 or

³ The Commission notes that Exhibit 5 is attached to the rule filing filed with the Commission but not to this release. The text of the proposed rule change is available at FINRA, on its Web site (<http://www.finra.org>), and at the Commission's Public Reference Room.

⁴ See Securities Exchange Act Release No. 58532 (September 12, 2008), 73 FR 54649 (September 22, 2008) (order approving SR-NASD-2007-041).

⁵ See *Regulatory Notice* 08-49 (September 2008).

¹¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.