

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES AND EXCHANGE ACT OF 1934
Rel. No. 66611 / March 15, 2012

Admin. Proc. File No. 3-13687

In the Matter of the Application of

INTERNATIONAL POWER GROUP, LTD.
c/o John Benvengo, CEO/President
1420 Celebration Blvd., Suite 313
Celebration, FL 34747

For Review of Action Taken by

DEPOSITORY TRUST COMPANY

OPINION OF THE COMMISSION

REGISTERED CLEARING AGENCY PROCEEDING

Denial of Access to Services

Registered clearing agency suspended book-entry clearing and settlement services with respect to issuer's securities held by clearing agency's Participants. *Held*, suspension constitutes denial or limitation of clearing agency's services with respect to any person, and proceeding is *remanded* to clearing agency in order to provide the requisite fair procedure.

APPEARANCES:

John Benvengo, CEO and President, for International Power Group, LTD.
Gregg M. Mashberg, of Proskauer Rose LLP, New York, NY, for the Depository Trust Company.

Appeal filed: November 16, 2009
Last brief received: June 28, 2010

International Power Group, Ltd. ("IPWG") has appealed from a decision of The Depository Trust Company ("DTC"), a registered clearing agency,¹ to suspend indefinitely book-entry clearing and settlement services to its Participants with respect to IPWG's common stock. DTC challenges IPWG's right to Commission review of DTC's decision.

I.

DTC provides clearing and settlement services for its "Participants," *i.e.*, broker-dealers and other firms that satisfy the requirements of DTC Rule 2, with respect to the Participants' trades of "Eligible Securities."² In order to make a new issue of securities DTC eligible, DTC requires issuers to submit an Eligibility Questionnaire, which, among other things, requires the issuer to provide information about the issue's registration or exemption status.³ DTC provides two levels of services to its Participants for "Eligible Securities": (1) a "full range of depository services," including "book-entry delivery and settlement through [DTC's] Underwriting Service," and (2) a "limited DTC service such as its Custody Service."⁴ IPWG's common stock was granted status as an Eligible Security. Prior to September 30, 2009, DTC provided the full range of services to its Participants for IPWG's common stock.

¹ DTC is a wholly owned subsidiary of The Depository Trust & Clearing Corporation. DTC, as a registered clearing agency, falls within the definition of a self-regulatory organization ("SRO"). 15 U.S.C. § 78c(a)(26). DTC provides clearance, settlement, custodial, underwriting, registration, dividend, and proxy services for a substantial portion of all equities, corporate and municipal debt, exchange-traded funds, and money market instruments available for trading in the United States. In 2010, DTC processed 295,000,000 book-entry transfers of securities worth \$273.8 trillion.

² DTC Rule 5 defines an "Eligible Security" as "a Security accepted by the [DTC], in its sole discretion, as an Eligible Security. The [DTC] shall accept a Security as an Eligible Security only (a) upon a determination by the [DTC] that it has the operational capability and can obtain information regarding the Security necessary to permit it to provide its services to Participants and Pledgees when such Security is Deposited and (b) upon such inquiry, or based upon such criteria, as the [DTC] may, in its sole discretion, determine from time to time."

³ DTC's Operational Arrangements, Section I.A.1, state, "Generally, the issues that may be made eligible for DTC's book-entry delivery and depository services are those that: (i) have been registered with the United States Securities and Exchange Commission ('SEC') pursuant to the Securities Act of 1933, as amended ('Securities Act'); (ii) are exempt from registration pursuant to a Securities Act exemption that does not involve transfer or ownership restrictions; or (iii) are eligible for resale pursuant to Rule 144A or Regulation S (and otherwise meet DTC's eligibility criteria)."

⁴ DTC Operational Arrangements Section I.

On September 24, 2009, the Commission filed a complaint in the United States District Court for the Middle District of Florida against a number of defendants (the "Civil Litigation").⁵ Neither IPWG nor any of its officers or directors was named as a defendant. The complaint alleged that four issuers, including IPWG, issued shares of common stock to the defendants named in the complaint (the "Complaint Defendants") without adhering to the registration requirements of Section 5 of the Securities Act of 1933.⁶ The Complaint Defendants, in turn, sold the shares to the public in unregistered transactions when no exemption from registration was available.

As relevant here, the complaint alleged that IPWG assigned to Complaint Defendant Signature Leisure, Inc. ("Signature") "about \$270,000 of alleged debt that [IPWG] owed to one of its officers for loans he supposedly made to the company." The complaint further alleged that the debt agreements included convertibility provisions under which Signature could convert the debt into IPWG stock. The complaint alleged that Signature exercised these conversion rights and that IPWG issued over 162,000,000 shares to Signature. The complaint states, "As of August 17, 2009, Signature Leisure has sold less than half of these shares to the investing public. On information and belief, it maintains control of the remaining shares. Moreover, under the second agreement, about \$80,000 in 'debt' remains for possible conversion [into] more than one hundred million shares of International Power stock."⁷

On September 30, 2009, DTC issued an "Important Notice" to its Participants that stated, "As a result of [the Civil Litigation], DTC has suspended all services, except Custody Services, for the below-referenced issues," which included the common shares of IPWG. IPWG, when it learned of the Important Notice, requested DTC to provide a hearing, pursuant to DTC Rule 22, on the suspension of services announced by the Important Notice.⁸ DTC denied IPWG's request on November 3, 2009.

DTC stated that Rule 22(f) was not applicable to the suspension announced in the

⁵ *SEC v. K&L Int'l. Enters., Inc. et al.*, No. 6:09-CV-1638-31KR (M.D. Fla. Sept. 28, 2009), Lit. Rel. No. 21224.

⁶ 15 U.S.C. § 77e.

⁷ The court entered, pursuant to settlement, a final judgment as to the Complaint Defendants on May 12, 2010. Under the terms of the settlement, Signature agreed, without admitting or denying the allegations of the complaint, to (1) an injunction against future violations of Section 5 of the Securities Act; (2) pay disgorgement in the amount of \$716,904, plus prejudgment interest thereon in the amount of \$16,456.52; (3) pay a civil penalty in the amount of \$50,000 under Section 20(d) of the Securities Act; and (4) a three-year bar from participating in an offering of penny stock under Section 20(g) of the Securities Act.

⁸ DTC Rule 22(f) provides an opportunity for Interested Persons to be heard on "any determination of the [DTC] that an Eligible Security shall cease to be such." IPWG, as an issuer of securities traded using DTC's services, is an "Interested Person" under DTC Rule 22.

Important Notice. According to DTC, IPWG common stock remained an "Eligible Security" under DTC's Rules because DTC continued to provide custodial services for IPWG common stock.⁹ DTC added that it would "lift the suspension on the provision of services for IPWG securities once the matter of the unregistered IPWG shares is resolved between IPWG and the SEC. In that regard, DTC urges [IPWG] to address its concerns to the SEC." DTC did not explain what action IPWG should seek from the Commission. IPWG filed the instant appeal.¹⁰

II.

IPWG's appeal raises two issues: (1) whether the Commission has jurisdiction to review the suspension as a limitation on access to services under Section 19(f) of the Securities Exchange Act of 1934;¹¹ and (2) whether IPWG has standing to request Commission review under Section 19(d) of the Exchange Act. Exchange Act Section 19(f) authorizes Commission review of SRO action prohibiting or limiting "any person with respect to access to services offered by [the SRO] or any member thereof." Exchange Act Section 17A(b)(3)(H) further requires clearing agency rules to provide fair procedures with respect to "the prohibition or limitation by the clearing agency of any person with respect to access to services offered by the clearing agency." The statutes do not specify who is included within the class of "any person" entitled to fair procedures and Commission review if they are denied or limited "with respect to access to services offered by" a clearing agency,¹² and we are unaware of any precedent

⁹ DTC confirmed in its brief that it has no express provision for reviewing denials or limitations on access other than those set forth in Rule 22.

¹⁰ In connection with IPWG's appeal, in March 2010, DTC requested oral argument before the Commission. IPWG did not oppose DTC's request for oral argument. On June 3, 2010, the Commission determined that, "based on the unique facts and circumstances of [IPWG's] appeal," it was appropriate to exercise the Commission's discretion to grant DTC's oral argument request. Oral argument was initially scheduled to occur in April 2011, but IPWG requested a delay of the date of the oral argument because its counsel had withdrawn from representing IPWG in this appeal. The oral argument was re-scheduled for July 2011. However, IPWG subsequently informed the Commission that it did not intend to appear at oral argument, and the Commission determined that, under the circumstances, it was appropriate to cancel the oral argument. DTC did not object to the cancellation of oral argument.

¹¹ Because DTC's action was not disciplinary in nature, the Commission does not have jurisdiction under Section 19(e) of the Exchange Act.

¹² Section 19(d)(2) provides that a person "aggrieved" by any SRO action set forth in Section 19(d)(1), including denials or limitations on access, may apply to the Commission for review. There is neither a statutory definition of nor legislative history concerning the term "aggrieved" in the context of Section 19(d). We conclude that whether IPWG has standing as a person "aggrieved" by DTC's action turns on the determination of whether IPWG is "any person" (continued...)

construing the language in the context of services offered by a clearing agency. We note, however, that the Commission has previously included "issuers" as persons "having or seeking access to facilities of a . . . registered clearing agency."¹³

The legislative history of Sections 19(f) and 17A(b)(3)(H) does not address this issue directly. These provisions were added in the Senate bill.¹⁴ In support of its argument that it is entitled to a process for challenging DTC's suspension of services, IPWG cites the portion of the Senate Report that states, "With respect to non-members, the Committee believes the Exchange Act should be amended to require all self-regulatory agencies to adopt procedures which will afford constitutionally adequate due process to non-members directly affected by self-regulatory action."¹⁵ However, it appears that this statement refers to members and non-members of exchanges and registered securities associations, and thus is not directly apposite to clearing agency participants or non-participants.¹⁶

In support of its argument that IPWG is not within the class of persons entitled to a process for challenging DTC's actions, DTC looks to another portion of the Senate Report discussing the obligation of clearing organizations to provide fair procedures: "As self-regulatory organizations under this title, registered [clearing organizations have] responsibilities over participants and the conduct of participants."¹⁷ The next sentence in the Report refers the reader back to the Report's discussion of the fair procedures required of registered securities exchanges in the context of disciplinary actions against members of the exchange.¹⁸ However, as DTC acknowledges, the suspension of services with respect to IPWG's securities at issue here was not disciplinary in nature.

The Senate Report states that review is available for exchange or registered security association action that "prohibits or limits any person access to services offered by the self-

¹² (...continued)
within the meaning of Section 19(f) and Section 17A(b)(3)(H).

¹³ Self-Regulatory Organization Proposed Rule Changes, 40 Fed. Reg. 40509, 40510 (Sept. 3, 1975).

¹⁴ S. 249, 94th Cong. (1975) (enacted).

¹⁵ S. Rep. No. 94-75 at 25 (1975), *reprinted in* 1975 U.S.C.C.A.N. 179, 204.

¹⁶ *Compare* Exchange Act Section 3(a)(3) (defining "member" for exchanges and registered securities association), 15 U.S.C. § 78c(a)(3), *with* Section 3(a)(24) (defining "participant" of clearing agency), 15 U.S.C. § 78c(a)(24).

¹⁷ 1975 U.S.C.C.A.N. at 302.

¹⁸ *Id.*

regulatory organization or a member thereof"¹⁹ Similarly, the Senate Report states that a clearing agency "must provide a fair and orderly procedure with respect to . . . the prohibition or limitation by the clearing agency of access by any person to services offered by the clearing agency."²⁰ However, neither statement specifically addresses the class of persons who may apply for review or be entitled to fair process.

Where an agency confronts such ambiguity in a statute it administers, the agency's textual construction of a statute is entitled to deference.²¹ We first note that the legislative history stressed the importance of any SRO's role and responsibilities, and the consequent need to hold SROs accountable for their actions through the provision of a fair process to hear challenges to their actions. In addition, one of the primary purposes of the 1975 amendments to the Securities Exchange Act of 1934, which created the National System for Clearance and Settlement of Securities ("NSCSS"), was to eliminate the need for the physical transfer of stock certificates in connection with the settlement among brokers and dealers of securities transactions.²² By reducing the temporal lags between trade of securities and settlement, the NSCSS provides a legal framework in which securities can be traded quickly and efficiently, while reducing the systemic risks that would otherwise exist. Under the NSCSS, registered clearing agencies like DTC maintain contractual relationships with and provide services directly to the holders of the securities traded using the clearing agencies' services, and not the issuers of those securities. Such a framework results in the enhanced efficiencies of a system of centralized clearing of securities trades. Our interpretation of the statute is informed by these overarching goals.

DTC urges that a person must receive a service directly from a registered clearing agency to be a person entitled to Section 19(f) review. DTC asserts that only Participants are such persons because they receive services directly from DTC, IPWG receives no services directly

¹⁹ *Id.* at 309.

²⁰ *Id.* at 301.

²¹ *See Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 & n.11 (1984) (If . . . Congress has not directly addressed the precise question at issue [in a statute administered by a federal agency], . . . the question . . . is whether the agency's answer is based on a permissible construction of the statute"); *Salvatore F. Sodano*, Securities Exchange Act Rel. No. 59141 (Dec. 22, 2008), 94 SEC Docket 12714, 12716 & n.7 ("If the language of a statute entrusted to our administration is ambiguous, our interpretation of the text is entitled to deference by reviewing courts, as long as the interpretation is reasonable.") (citing *SEC v. Zandford*, 535 U.S. 813, 819-20 (2002) (citing *United States v. Mead Corp.*, 533 U.S. 218, 229-30 & n.12 (2001))); *Fin. Planning Ass'n. v. SEC*, 482 F.3d 481, 487 (D.C. Cir. 2007).

²² *See* 15 U.S.C. § 78q-1(e).

from DTC, and therefore IPWG is not a "person" covered by Section 19(f).²³ However, if DTC were correct about Congress's intent, a more obvious way to achieve that intent would have been to limit Section 19(f) review to denials or limitations of "any [Participant] . . . to access to services offered by [the clearing agency] to such [Participant]. . . ." Congress instead chose the terms "any person" and "with respect to access to services," suggesting a class of persons broader than those with direct access to services themselves. In this regard, Exchange Act Section 17A(b)(3)(H) (which was enacted at the same time as Sections 19(d) and (f)) shows that Congress knew how to differentiate between Participants and non-Participants. Section 17A(b)(3)(H) requires clearing agency rules to provide a fair procedure for "disciplining *participants*, [and] the denial of *participation* to any persons seeking *participation* therein," but then requires such a fair procedure for "the prohibition or limitation by the clearing agency of *any person* with respect to access to services offered by the clearing agency" (emphasis added).

We agree with DTC that the reach of "any person" in Sections 17A(b)(3)(H) and 19(f) is not limitless. However, we believe that issuers occupy a unique position in the regulatory scheme and conclude that "any person" in those provisions must include issuers of securities with respect to which a clearing agency provides clearance and settlement services. In establishing the NSCSS, Congress sought to eliminate the paper transfer of issuers' securities. DTC's role as an SRO and securities depository offering book-entry clearing and settlement services is central in this scheme, and those services are the fundamental ones offered by DTC. We have previously held that to be eligible for review under Sections 19(d) and (f), an SRO's action must deny or limit "the applicant's ability to utilize one of the fundamentally important services offered by the SRO."²⁴ Any suspension by DTC of clearance and settlement services with respect to an issuer's securities means that all trades in that issuer's stock would require the physical transfer of stock certificates, which affects the issuer of the suspended securities directly, because of the potential impact on liquidity and price for the issuer's stock due to the difficulties and uncertainties inherent in physical transfer of stock certificates.

²³ In support of this position, DTC notes that Exchange Act Section 6(b)(7), 15 U.S.C. § 78f(b)(7) (governing exchanges), and 15A(b)(8), 15 U.S.C. § 78o-3(b)(8) (governing registered securities associations), require fair procedures in the event of "the prohibition or limitation by the [exchange or association] of any person with respect to access to services offered by the [exchange or association] *or a member thereof*." Section 17A(b)(3)(H), as discussed above, does not include the language "or a member thereof." According to DTC, the absence of this language in Section 17A indicates that Congress intended that clearing agencies provide fair procedures only to Participants themselves, not to third parties who may receive services from a "member thereof." (DTC takes the further position that IPWG receives no services from either DTC or any of its Participants.) However, we note that Exchange Act Section 17A(b)(6) prohibits a registered clearing agency from prohibiting or limiting access by any person to services offered by one of its participants. Moreover, this argument does not address the significance of the terms "any person" and "with respect to access to services" in both Exchange Act Sections 19(f) and 17A(b)(3)(H). See discussion in text *infra*.

²⁴ *Morgan Stanley & Co., Inc.*, 53 S.E.C. 379, 385 (1997).

Broker-dealer Participants trading securities subject to a suspension may, of course, be affected by loss of or increased cost of doing business, or difficulties in fulfilling market-making obligations. While these negative impacts of a DTC suspension on a Participant could be remedied by challenging DTC's denial of the Participant's access to services,²⁵ however, a Participant may have the easier alternative of buying and selling other securities. Individuals who wish to buy or sell securities that have been suspended might be negatively affected as well,²⁶ but those negative effects are limited in scope. An owner wishing to sell a suspended security may suffer the one-time cost and inconvenience involved in a paper transaction, and a prospective buyer can either accept any cost and inconvenience of a paper transaction or opt to purchase a different security. For an issuer, however, the negative impact of a suspension is of indefinite duration and affects all transactions in its suspended securities.

We also note that DTC includes issuers whose securities cease to be Eligible Securities in the Rule 22 definition of Interested Persons who are entitled to an opportunity to be heard.²⁷ DTC suggests that, because DTC continues to provide custodial services for IPWG securities, IPWG remains an Eligible Security and is therefore not entitled to an eligibility hearing under DTC Rule 22.²⁸ However, DTC seems to recognize different degrees of "eligibility." For example, DTC's Operational Arrangements state that a security must either be registered with the Commission or subject to a valid exemption from registration in order for that security "to be made *eligible* for DTC's book-entry delivery and depository services" (emphasis added). The November 3, 2009 letter from DTC counsel to IPWG states that a material portion of the IPWG securities held in DTC custody are neither registered nor exempt (the two criteria for eligibility).

²⁵ *But see infra* note 28 (under DTC's interpretation of Rule 22, Participants would not necessarily appear to have the right to challenge suspensions of this type).

²⁶ IPWG attached, as exhibits to one of its briefs in this appeal, statements from IPWG investors that broker-dealers restricted their ability to buy and sell IPWG shares during the period immediately after DTC suspended clearance and settlement services with respect to IPWG's securities. However, it nonetheless appears that trading continued after the suspension.

²⁷ The Commission order approving this amendment to Rule 22 states only that the amendment "would authorize an issuer or participant to contest a decision denying or terminating a security's depository-eligibility status." Exchange Act Rel. No. 23498 (Aug. 4, 1986), 36 SEC Docket 386, 387. It does not discuss what constitutes "eligibility" for purposes of fair process.

²⁸ Under DTC's narrow reading of Rule 22(f), even Participants would not have a right to a hearing to challenge the suspension at issue, notwithstanding DTC's concession that Participants are "persons actually affected by [DTC's] restriction on services." DTC does not address this anomaly other than to state that Participants "may present their concerns to DTC's executives."

DTC's brief to us on appeal further states that tens of millions of unregistered, non-exempt IPWG shares had been deposited at DTC and that "[s]uch non-freely tradable shares are not DTC eligible."

DTC has not articulated an adequate rationale for providing a hearing to an issuer for whose securities DTC will provide no services, but not to an issuer whose securities are denied those clearance and settlement services that go to the heart of DTC's role as a clearing agency. DTC contends that its decision to deny IPWG's hearing request is consistent with DTC's Rules and the purposes of the Exchange Act, because IPWG's continuing status as an Eligible Security allows clearance and settlement services to resume immediately, as soon as IPWG "resolves [the] matter" "of the very serious problem of millions of its unregistered shares having been deposited at DTC." In contrast, according to DTC, if IPWG were no longer an Eligible Security, IPWG would have to re-apply and be confirmed for status as an Eligible Security before such services could resume. DTC has not explained, however, what IPWG must do to "resolve the matter," and, in the meantime, IPWG is substantially affected by the suspension of critical DTC services. IPWG argues, "[t]he only substantive difference between IPWG's indefinite and summary suspension and the determination that IPWG is not an Eligible Security is . . . the lack of procedural and administrative safeguards available to IPWG as an Interested Party [sic] under the summary suspension." Furthermore, consistent with DTC's position that only Participants, not issuers, have a right of Commission review pursuant to Section 19(f), even issuers entitled to a Rule 22 hearing in the event eligibility is either denied or revoked in its entirety would not have a right to challenge the fairness of, or action taken by DTC at the conclusion of, such a hearing. This result seems anomalous, and DTC offers no rationale to explain this outcome.

We conclude, based on the analysis above, that the language "any person with respect to access to services" in Exchange Act Sections 19(f) and 17A(b)(3)(H) requires fair procedures at the registered clearing agency and permits Commission review of denial of access to issuers, such as IPWG, whose securities have been suspended from clearance and settlement services offered by a clearing agency, even if those services are not provided directly to the issuer.²⁹ DTC's rules cannot control the scope of the statutory terms in Exchange Act Sections 17A(b)(3)(H) or 19(f). Moreover, while DTC does not have a contractual relationship with

²⁹ DTC's assertion that it provides services only to its Participants is based in part on its Rule 6, which lists the services it provides and does not include in that list the acceptance of issuer securities as eligible, and in part on its argument that it has contractual relationships only with its Participants, not with issuers.

issuers, it does have a business relationship with them. As noted, DTC requires issuers to provide it with proof that their shares are either registered with the Commission or subject to a valid exemption before DTC will deem the shares eligible and has accorded the right to a Rule 22(f) hearing to issuers whose securities cease to be Eligible Securities under Rule 22.³⁰

Accordingly, we find that IPWG is a "person" entitled both to "fair procedures" under Exchange Act Section 17A(b)(3)(H) in connection with DTC's suspension of clearance and settlement services with respect to IPWG's securities held by DTC Participants and to Commission review under Exchange Act Section 19(f) of DTC's suspension determination.

III.

Exchange Act Section 17A(b)(5)(B) states that, when a registered clearing agency determines that "a person shall be . . . prohibited or limited with respect to access to services offered by the clearing agency, the clearing agency shall notify such person of, and give him an opportunity to be heard upon, the specific grounds for . . . prohibition or limitation under consideration and keep a record." Section 19(f) further provides that any Commission review will be based on the record before the self-regulatory organization, suggesting the necessity of compiling a record adequate to support any decision by DTC.

³⁰ In support of DTC's position that it owes no fair procedure to issuers like IPWG, DTC states, "Otherwise, the door may be flung open to all those who do business with a participant, including their institutional and retail customers." We believe, based on the analysis above, that DTC's relationships with the issuers of Eligible Securities are distinguishable from those between DTC and the institutional and retail customers of its Participants.

For example, in order to be able to trade securities using DTC's services, individual and retail customers of Participants are not required to provide information directly to DTC, nor is there any direct contact between DTC and those customers. Issuers, on the other hand, must provide DTC with a completed questionnaire in connection with eligibility requests.

Further, DTC has submitted, as an exhibit to its brief, evidence indicating that, on November 20, 2009, several weeks after DTC's suspension of services, trading volume in IPWG's securities was over 5,000,000 shares. Thus, individual shareholders were able to avoid the effects of the suspension by selling their shares, at least as of November 20, 2009. However, unlike individual shareholders, IPWG remains subject to the stigma of the suspension over two years after its initial imposition. Moreover, there might be other long-term effects on IPWG if the lengthy continuation of the suspension affected liquidity and share prices.

For many issuers, DTC does provide some recourse in circumstances such as those in which IPWG finds itself. An issuer may pursue, through a DTC Participant, the withdrawal of its securities from Eligible Security status.³¹ Once a Participant's request to withdraw the issuer's securities from eligibility status is granted, the issuer can, with the assistance of a DTC Participant, re-apply for status as an Eligible Security. As part of the re-application for eligibility, the issuer may need to obtain an opinion of counsel stating that its securities were either registered with the Commission or the subject of a valid exemption from registration.³²

The option of pursuing a withdrawal of and re-application for eligibility through a Participant, however, may not be available to all issuers, especially relatively small companies such as IPWG, simply because Participants may find that not enough of their customers hold the issuer's securities for pursuit of the withdrawal and re-application for eligibility to be worthwhile to the Participant. If an issuer is unable to find a Participant willing to engage in this process with the issuer and also has no independent recourse when denied access by DTC to clearing and settlement services, then, in those circumstances, no person may have a means of challenging DTC's suspension of this central service in the NSCSS and ensuring DTC's accountability for its action. Thus, this indirect route for an issuer to respond to an order denying some but not all services with respect to its securities is not an adequate substitute for a direct opportunity for the issuer to be heard by DTC.

Given the record currently before us, we cannot conclude that DTC provided IPWG with the procedural safeguards required by Section 17A. DTC's Important Notice fails to meet the statutory requirements because (1) it was not sent to IPWG itself, but rather to DTC's Participants;³³ and (2) it merely points to the existence of the Commission's complaint against certain IPWG shareholders without any additional explanation of why the existence of the complaint warrants the suspension of clearance and settlement services with respect to IPWG's securities. Moreover, although Section 17A states that parties such as IPWG must receive an opportunity to be heard, DTC's November 3, 2009 letter responding to IPWG's request for a

³¹ An issuer's securities may be withdrawn from their status as Eligible Securities only with the assistance of a Participant. *See* Exchange Act Rel. No. 47978 (June 4, 2003), 80 SEC Docket 1309, 1310 ("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 [P]articipants of the receipt of the withdrawal request from the issuer and reminding [P]articipants 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 [P]articipants in the ordinary course of business but will not effectuate withdrawals based upon a request from the issuer.").

³² *See* "Information for Securities to be Made 'DTC-Eligible'," http://www.dtcc.com/products/documentation/asset/Securities_DTCEligibility.pdf, pp. 4-5.

³³ The record indicates that IPWG learned of the suspension a few days after the Important Notice was issued after being informed by a customer of a DTC Participant.

hearing states that "DTC declines [IPWG's hearing] request." The Important Notice also does not specify the expected duration of the suspension, nor does it specify the actions that IPWG must take to remove the suspension.

DTC asserts that it informally provided IPWG "an analogous procedure," implying it has satisfied any Section 17A requirements it may have with respect to IPWG. Specifically, DTC avers that it: (1) provided several oral responses to inquiries from IPWG's counsel regarding the reasons for the suspension of services, as well as possible means of lifting it; (2) reviewed IPWG's October 26, 2009 letter requesting a Rule 22 hearing on the suspension of services; and (3) issued a letter on November 3, 2009, responding to IPWG's October 26 letter, setting forth its reasons for the suspension of services and suggesting possible avenues for its resolution. However, the content of the discussions between DTC and IPWG's counsel are not part of the record currently before the Commission.³⁴ Moreover, in the November 3, 2009 letter and before us, DTC claims that IPWG should "address its concerns to the SEC" in order to remove the suspension, but, as noted, neither the Important Notice, nor DTC in its briefs on appeal, articulates what relief DTC believes the Commission could provide to an issuer in IPWG's circumstances here.

DTC also states that it was required to act urgently in imposing the suspension because the Commission complaint in the Civil Litigation identified serious concerns that the "fungible bulk" of IPWG securities in DTC custody may have been tainted.³⁵ If DTC believes that circumstances exist that justify imposing a suspension of services with respect to an issuer's securities in advance of being able to provide the issuer with notice and an opportunity to be heard on the suspension, it may do so. However, in such circumstances, these processes should balance the identifiable need for emergency action with the issuer's right to fair procedures under

³⁴ As a result, we do not know whether DTC suggested that IPWG withdraw and re-apply for status as an Eligible Security. In any event, as noted above, this process does not give the issuer the opportunity to contest the validity of the suspension and requires the assistance of a DTC Participant. And there is no indication that any DTC Participant sought to assist IPWG in such a manner here.

³⁵ "Fungible bulk" means that there are no specifically identifiable shares directly owned by DTC Participants. Rather, each Participant owns a *pro rata* interest in the aggregate number of shares of a particular issuer held at DTC. Each customer of a DTC Participant owns a *pro rata* interest in the shares in which the DTC Participant has an interest. DTC argues that it is necessary to suspend clearance and settlement services to all of IPWG's shares held in DTC custody, not just the shares held by the Complaint Defendants, because it is impossible for DTC to distinguish which shares are freely tradable and which are not, since the shares are held in DTC's "fungible bulk" of IPWG securities.

the Exchange Act. Under such procedures, DTC would be authorized to act to avert an imminent harm, but it could not maintain such a suspension indefinitely without providing expedited fair process to the affected issuer.³⁶

DTC argues that process beyond that already provided to IPWG would serve no purpose. The reason for DTC's suspension (*i.e.*, the existence of the Commission's 2009 complaint) is uncontroverted and therefore, DTC contends, there are no relevant facts in dispute. Further, DTC claims that IPWG's culpability for the violations that served as the basis for the Commission's complaint was immaterial to the determination to suspend clearance and settlement services with respect to IPWG's securities.

However, several specific issues, which we consider important in making a determination whether DTC's actions were consistent with the purposes of the Exchange Act, remain unaddressed by the record of DTC's action that we currently have before us.³⁷ The lack of a record below makes it impossible for the Commission to assess the merits of these issues. For these reasons, it is necessary to remand the proceeding to DTC for such consideration.

IV.

Based on our review of the record and the applicable authorities discussed above, we conclude that IPWG is entitled to Commission review of DTC's suspension of clearance and settlement services with respect to IPWG's common shares, and that DTC did not provide IPWG with adequate fair procedure in connection with the suspension. In accordance with these determinations, we remand this proceeding to DTC for development of the record in accordance with this opinion and for further consideration, pursuant to procedures that accord with the

³⁶ DTC may design such processes in accordance with its own internal needs and circumstances. It may look for guidance to the processes provided: (1) under Federal Rule of Civil Procedure 65(a) and (b), Fed. R. Civ. P. 65(a) and (b), with respect to requests for preliminary injunctions and temporary restraining orders; and (2) under FINRA Rule 9558 with respect to actions authorized by Section 15A(h)(3) of the Exchange Act. These processes include (1) specification of the type of evidence that must be included in an initial notice to justify immediate action; and (2) processes that provide an expedited opportunity for the opposing party to be heard.

³⁷ For example, in support of its argument that the suspension of clearance and settlement services with respect to all IPWG shares, and not only those held by the Complaint Defendants, was unnecessarily draconian, IPWG argues that the remedies available to individuals who purchase securities sold in violation of Section 5 of the Securities Act of 1933 provide adequate protection of the public against the sales of unregistered securities. DTC does not respond to this IPWG argument, other than to reiterate that it is impossible to distinguish between the holders of particular shares in the "fungible bulk." IPWG could also address whether its securities currently are registered or exempt from registration.

fairness requirements of Section 17A(b)(3)(H) of the Exchange Act, of the determination to suspend all services, except custody services, for the common shares of IPWG. In addition, we believe that DTC should adopt procedures that accord with the fairness requirements of Section 17A(b)(3)(H), which may be applied uniformly in any future such issuer cases. We do not intend to suggest any view on the outcome of this remand.

An appropriate order will issue.³⁸

By the Commission (Chairman SCHAPIRO and Commissioners WALTER, AGUILAR, PAREDES and GALLAGHER).

Elizabeth M. Murphy
Secretary

³⁸ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66611 / March 15, 2012

Admin. Proc. File No. 3-13687

In the Matter of the Application of
INTERNATIONAL POWER GROUP, LTD.
c/o John Benvengo, CEO/President
1420 Celebration Blvd., Suite 313
Celebration, FL 34747

For Review of Action Taken by
DEPOSITORY TRUST COMPANY

ORDER REMANDING PROCEEDING TO REGISTERED CLEARING AGENCY

On the basis of the Commission's opinion issued this day, it is

ORDERED that this proceeding with respect to International Power Group, Ltd. be, and it hereby is, remanded to The Depository Trust Company for further consideration.

By the Commission.

Elizabeth M. Murphy
Secretary