

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44838; File No. SR-MBSCC-2001-01]

Self-Regulatory Organizations; MBS Clearing Corporation; Notice of Filing of Proposed Rule Change Relating to Arrangements To Integrate MBS Clearing Corporation and The Depository Trust & Clearing Corporation

September 24, 2001.

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 ("Act"), notice is hereby given that on August 22, 2001, the MBS Clearing Corporation ("MBSCC") filed with the Securities and Exchange Commission ("Commission") a proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by MBSCC. 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

The proposed rule change involves the initial arrangements for the integration of MBSCC with The Depository Trust & Clearing Corporation ("DTCC").²

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

In its filing with the Commission, MBSCC 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. MBSCC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.³

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

The proposed rule change is the first formal regulatory step to effect the integration of MBSCC with DTCC. Specifically, the rule change would implement certain changes in MBSCC's organizational documents to facilitate

the integration with DTCC and the subsequent exchange offer.

1. Background

At its meeting on July 19, 2001 the Board of Directors of MBSCC voted to proceed with a plan for the integration of MBSCC and Government Securities Clearing Corporation ("GSCC") with DTCC ("Plan").⁴ Such integration is expected to take place concurrently with the integration of Emerging Markets Clearing Corporation ("EMCC") with DTCC.⁵ MBSCC has been advised that DTCC's Board of Directors has also agreed to proceed with the Plan.

A principal goal of the Plan is to facilitate the development and timely execution of a strategy to harmonize the processing streams at MBSCC, GSCC, EMCC, The Depository Trust Company ("DTC") and the National Securities Clearing Corporation ("NSCC") (collectively, "Operating Subsidiaries") for the clearance and settlement of both institutional and broker transactions. Harmonized processing should help to accommodate shortened settlement cycles, address increasing volumes, improve risk management, and lower transaction processing costs.

2. The Plan

Under the Plan, DTCC will form (i) a company that will engage in a merger with MBSCC ("Operating Company"), (ii) a company that will own all of the capital stock of Operating Company ("Holding Company"), and (iii) an acquisition subsidiary ("Acquisition Company") that will make an exchange offer ("Exchange Offer") for Holding Company shares, as described below, and hold shares of Holding Company received pursuant to the Exchange Offer.

After receipt of all necessary regulatory, board, and shareholder approvals, Operating Company will merge with MBSCC in a transaction ("Merger") in which (i) the shareholders of MBSCC ("MBSCC Shareholders") will receive an equal number and class of shares of Holding Company stock for their shares of MBSCC Class A and Class B common stock; (ii) all of the

shares of MBSCC will be cancelled; and (iii) all the shares of Holding Company stock owned by DTCC will be cancelled. MBSCC shareholders will have the opportunity to vote against the Merger and to exercise their appraisal rights. MBSCC will be the surviving corporation of the Merger.

Following a successful merger, the MBSCC Shareholders Agreement will be terminated. The Acquisition Company will conduct the Exchange Offer in which the shareholders of Holding Company ("Holding Company Shareholders") *i.e.*, former MBSCC Shareholders, will have the opportunity to exchange their shares of Holding Company common stock for shares of DTCC common stock on the basis of the adjusted book value of the shares of MBSCC common stock that they exchanged for their shares of Holding Company common stock and the adjusted book value of the DTCC common shares. Adjusted book value of MBSCC shares will equal book value less the retained earnings of MBSCC at the time of (or as of the end of the last full calendar month preceding) the integration of MBSCC with DTCC. Such retained earnings will thereafter be used only to support the business of MBSCC. Adjusted book value of the DTCC common shares will equal book value less the smaller of (i) the retained earnings of DTCC attributable to the retained earnings of NSCC at the time of the integration of NSCC and DTC with DTCC in 1999 or (ii) the retained earnings of DTCC attributable to the retained earnings of NSCC at the time of (or as of the last full calendar month preceding) the integration of MBSCC with DTCC. Such retained earnings are dedicated to the business of NSCC.

Following a successful Exchange Offer, (i) Acquisition Company will be the majority or sole (depending on whether all Holding Company Shareholders agree to tender their shares) shareholder of Holding Company; (ii) Holding Company will be the sole shareholder of MBSCC; and (iii) any non-tendering Holding Company Shareholders (former MBSCC Shareholders) will be minority shareholders of Holding Company.

DTCC, through its wholly-owned subsidiary, Acquisition Company, will elect as directors of MBSCC the persons elected by the shareholders of DTCC to be directors of DTCC. As a subsidiary of the Holding Company (and indirect subsidiary of Acquisition Company), MBSCC will continue to operate essentially as it does currently, offering its own services to its own members pursuant to separate legal arrangements

⁴ Because of the current functional integration of operations of MBSCC and GSCC, the integration of MBSCC with DTCC is contingent upon the successful integration of GSCC with DTCC and vice versa. Securities Exchange Act Release No. 44895 (Oct. 2, 2001) [File No. SR-GSCC-2001-11].

⁵ Pursuant to a separate plan for the integration of EMCC with DTCC, it is contemplated that EMCC will become an operating subsidiary of DTCC at the same time that MBSCC and GSCC become operating subsidiaries of DTCC. However, the integration of MBSCC and GSCC with DTCC is not contingent on the integration of EMCC with DTCC and vice versa. Securities Exchange Act Release No. 44896 (Oct. 2, 2001) [File No. SR-EMCC-2001-3].

¹ 15 U.S.C. 78s(b)(1).

² DTCC is a holding company for The Depository Trust Company and the National Securities Clearing Corporation, which are registered clearing agencies.

³ The Commission has modified the text of the summaries prepared by MBSCC.

and separate risk management procedures.

Following the integration, MBSCC will continue to exist as a separate registered clearing agency. The retained earnings of MBSCC at the time of (or as of the end of the last full calendar month preceding) the integration of MBSCC with DTCC will, as a matter of DTCC policy, be dedicated to supporting the business of MBSCC. MBSCC will be sufficiently capitalized for its activities as a clearing agency.

Acquisition Company, Holding Company, and DTCC will not engage in clearing agency activities. Certain support functions, including human resources, finances, audit, general administration and corporate communications that are now centralized in DTCC will be provided by DTCC to MBSCC pursuant to service contracts.

After the proposed integration, Acquisition Company, which is wholly owned by DTCC, will be the majority or sole (depending on whether all Holding Company shareholders, *i.e.* former MBSCC Shareholders, tender their shares during the Exchange Offer) shareholder of Holding Company, which, in turn, will be the sole shareholder of MBSCC. In or to promote efficiency in the governance of Operating Subsidiaries after the Plan is completed, the current By-Laws of MBSCC will be replaced with a set of By-Laws that conform, except for certain small modifications⁶ and a more broadly drafted indemnification provision, to the By-Laws of NSCC.

⁶ The modifications include (i) making all references gender-neutral, (ii) changing the references to the State of New York to the State of Delaware (except the reference in Section 5.2), (iii) providing in Section 1.2 that a majority, rather than twenty-five percent, of all outstanding shares may make a demand to call a special meeting, (iv) providing for the ability to notify shareholders of shareholder meetings electronically in Section 1.4, (v) deleting the provision addressing shareholder action by written consent because this is addressed under Delaware law, (vi) setting the number of directors in Section 2.1 at a minimum of fifteen and maximum of twenty-five, rather than twenty-seven, (vii) providing in Section 2.1 that the number of directors at any time shall be determined by the Board of Directors of MBSCC, (viii) providing in Section 2.9 that directors of MBSCC that are also officers of GSCC or DTCC, rather than directors, officers, or employees of any MBSCC shareholders, may not serve on the Audit Committee, (ix) providing in Section 3.1 that the officers of MBSCC will include those required by statute and may include a Chief Executive Officer, (x) eliminating the provision in Section 3.3 that the President shall be the Chief Executive Officer, (xi) eliminating the provision in Section 3.4 that Managing Directors shall upon request advise and assist the Chief Operating Officer, and (xii) providing in Article VIII that a majority of the holders of all outstanding shares, rather than all the holders of all outstanding shares, may amend the MBSCC By-Laws.

As part of the Plan, a structure will be implemented allowing for the fair representation of the members of each of the Operating Subsidiaries in the governance of DTCC. Specifically, the DTCC shareholders, consisting of the current shareholders of DTCC and the shareholders of MBSCC, GSCC, and EMCC, which become shareholders of DTCC as a result of the Plan, will elect the persons to serve on the Board of Directors of DTCC. These individuals will, in turn, be selected by DTCC to serve as the directors of each of the Operating Subsidiaries. On a periodic basis to be determined by the DTCC Board, rights to purchase DTCC common stock will be reallocated to shareholders using the services of any one or more of the Operating Subsidiaries based upon their usage. Shareholders may, but will not be obligated to, purchase some or all of the DTCC common stock to which they are entitled. Holders of DTCC common stock will be entitled to cumulative voting in the election of directors.

In addition, DTCC will create a Fixed Income Operations and Planning Committee that will include representatives of members of each of MBSCC and GSCC. The Fixed Income Operations and Planning Committee will advise the DTCC Board and management on its policies and procedures with respect to the fixed income products and/or services of the Operating Subsidiaries and will have certain other responsibilities to be assigned to the Committee.

Furthermore, MBSCC and GSCC will establish a joint GSCC/MBSCC Membership and Risk Management Committee, which will be comprised of representatives of participants of MBSCC and GSCC. The joint GSCC/MBSCC Membership and Risk Management Committee will advise the Boards of Directors and management of MBSCC and GSCC with respect to membership, credit, and risk matters, and will have certain other responsibilities to be assigned to the Committee.

DTCC's Certificate of Incorporation, By-Laws, and Shareholders Agreement ("Basic Documents") will be amended to extend to the shareholders of MBSCC, GSCC, and EMCC, which become shareholders of DTCC as a result of the Plan, the rights that the shareholders of DTCC currently have and, in particular, to satisfy the Fair Representation Requirement of Section 17A of the Exchange Act. In this regard, the Basic Documents will provide for the following:

- The persons elected as directors to the DTCC Board will also serve as the

directors of each of the Operating Subsidiaries, including MBSCC.

- Other than, as is currently the case, one director appointed to the DTCC Board by the New York Stock Exchange, Inc., as the owner of DTCC preferred stock, and one director appointed to the DTCC Board by the National Association of Securities Dealers, Inc., as the owner of DTCC preferred stock, all directors will be elected annually by the owners of DTCC common stock.

- As discussed above, the right to purchase DTCC common stock will be reallocated to the users of each of the Operating Subsidiaries based upon their usage. Under the Basic Documents, these rights will be reallocated on a periodic basis to be determined by the DTCC Board.

- The owners of DTCC common stock will be able to exercise cumulative voting in the election of directors of DTCC.

- With respect to the nomination process, each year the DTCC Board will appoint a nominating committee that may include both members and nonmembers of the DTCC Board. After soliciting suggestions from all users of each of the Operating Subsidiaries of the possible nominees to fill vacancies on the DTCC Board, the nominating committee will recommend a slate of nominees from the full DTCC Board. The DTCC Board may make changes in that slate before submitting nominations to the holders of DTCC common stock for election. The election ballot included in the proxy materials will provide an opportunity for stockholders to cast their votes for a person not listed as a nominee. Because the Basic Documents will provide for cumulative voting, certain large holders of DTCC common stock may have a sufficient number of shares to elect a person not on the slate nominated for election by the DTCC Board.

The Certificate of Incorporation and By-Laws of MBSCC will be revised to reflect the changes in MBSCC's corporate governance structure.⁷ MBSCC's Certificate of Incorporation shall be amended and restated in accordance with Section 245 of the Delaware General Corporation Law ("Section 245") as follows:

- The amended and restated Certificate of Incorporation shall contain a preamble and recitals pursuant to Section 245.

- The fourth article of the Certificate of Incorporation shall be amended to eliminate all references to Class A and

⁷ The full text of the proposed changes to the Certificate of Incorporation and to the By-Laws is set forth in Exhibit A of MBSCC's rule filing.

Class B Common Stock, including the right of holders of Class B Common Stock to elect one MBSCC director. References to Class B Common Stock, including the right of holders of Class B Common Stock to elect a director, will no longer be necessary as MBSCC will be wholly-owned by Holding Company. All of MBSCC's directors will be elected by DTCC through its wholly-owned subsidiary, Acquisition Company, which will be the majority or sole (depending on how many Holding Company shareholders, *i.e.*, former MBSCC shareholders, tender their Holding Company shares in the Exchange Offer) shareholder of Holding Company. The former holders of MBSCC Class B Common Stock, as well as the former holders of Class A Common Stock, that participate in the Exchange Offer will have the opportunity to participate in the governance of DTCC through the election of DTCC's directors.

- The fifth article of the Certificate of Incorporation shall be stricken as permitted by Section 245 of the Delaware General Corporation Law and the sixth, seventh, ninth and tenth articles of the Certificate of Incorporation shall be deleted as unnecessary. The remaining articles shall be renumbered accordingly.
- The eighth article (as revised, the fifth article) of the Certificate of Incorporation shall be modified to include a reference to a testator or intestate of a person that is being indemnified.

MBSCC believes that the proposed rule change is consistent with the requirements of Section 17A of the Exchange Act and the rules and regulations thereunder applicable to MBSCC because it is designed to coordinate further the activities of each of the Operating Subsidiaries in order to help assure the continued prompt and accurate clearance and settlement of securities transactions in the face of changing business and regulatory requirements for the securities industry. Specifically, the proposed integration structure satisfies the fair representation requirement of Section 17A of the Act, by (1) giving participants, including those participants of MBSCC, of each of the Operating Subsidiaries who are also shareholders of DTCC the right to purchase shares of DTCC common stock on a basis that reflects their use of the services and facilities of each of the Operating Subsidiaries. This system for reallocating entitlements to purchase shares of DTCC common stock among participants will be the same as that now employed by DTCC for reallocating entitlements to purchase shares of DTCC

common stock among participants of DTCC and NSCC and (2) selecting individuals to be directors of DTCC (who will also be directors of each of the Operating Subsidiaries) on a basis that will ensure that all major constituencies in the securities industry will have a voice in the business and affairs of each of the Operating Subsidiaries. Finally, the proposed rule change will not affect, and is therefore consistent with, the safeguarding of securities and funds in MBSCC's custody or control or for which it is responsible.

B. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

MBSCC does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. MBSCC, as well as each of the other Operating Subsidiaries, is a utility created to serve members of the securities industry by providing certain complementary services that are ancillary to the businesses in which industry members compete with one another.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments relating to the proposed rule change have been solicited or received.

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

Within thirty-five days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve such proposed rule change or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange

Commission, 450 Fifth Street, N.W., Washington, D.C. 20549-0609. 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 those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at MBSCC's principal office. All submissions should refer to File No. SR-MBSCC-2001-01 and should be submitted by October 31, 2001.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁸

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-44898; File No. SR-NASD-2001-64)

Self-Regulatory Organizations; Notice of Filing of a Proposed Rule Change by the National Association of Securities Dealers, Inc. Adjusting the Fees Charged to Non-NASD Members for Use of the Nasdaq National Market Execution System and the SelectNet Service

October 2, 2001

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 September 28, 2001, the National Association of Securities Dealers, Inc. ("NASD") through its subsidiary, the Nasdaq Stock Market, Inc. ("Nasdaq") 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 Nasdaq. On October 2, 2001, Nasdaq filed Amendment No. 1 with the Commission.³ The Commission is

⁸ 7 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Letter from John M. Yetter, Assistant General Counsel, Office of General Counsel, Nasdaq, to Katherine A. England, Assistant