

Rule 17a-11 to MBSCC concurrently with their submission to the Commission. Rule 17a-11 requires registered broker-dealers to notify the Commission of a decline in net capital below minimum requirements. Such notices should provide MBSCC with early warnings of such broker-dealers' potential financial problems.

The second proposed modification would enhance MBSCC's policies and procedures regarding its participant surveillance procedures by establishing a formal surveillance status mechanism. The proposed rule change would establish a tiered surveillance mechanism wherein the degree of risk posed by a participant would be appropriately categorized so MBSCC would be able to react more swiftly to changes in a participant's condition.

The third proposed modification would allow non-domestic participants to meet their financial reporting requirements to MBSCC by submitting financial statements prepared in accordance with their home country GAAP. MBSCC's rules currently require these participants to submit financial statements prepared in accordance with U.S. GAAP. MBSCC has found this requirement to be burdensome and unnecessarily restrictive. MBSCC also proposes to permit these participants to use another recognized accounting standard (such as, for example, International Accounting Standards) deemed acceptable by MBSCC. In both cases (when a participant submits financial statements prepared in accordance with their home country GAAP and when a participant submits financial statements prepared in accordance with some other recognized accounting standard deemed acceptable by MBSCC), the participant must provide MBSCC with a discussion of the material variations of the accounting standards used from U.S. GAAP.

The fourth proposed modification allows MBSCC to use net asset value or other applicable indicia in calculating a participant's financial ability. MBSCC's rules do not currently specify the types of financial indicia that MBSCC may use to calculate a participant's net worth for determining whether the participant meets MBSCC's minimum financial requirements. MBSCC's analysts currently use the appropriate financial indicia for each type of participant. For example, shareholders equity is used to determine the financial ability of a bank whereas net asset value is more appropriate for determining the financial ability of certain types of funds, such as most registered investment companies. The proposed rule change would expand the language

in MBSCC's rules to permit use of the appropriate financial indicia.

The proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder because it will enhance MBSCC's monitoring of participants' financial condition and activities and thereby should protect MBSCC and its participants.

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

MBSCC does not believe that the proposed rule change will have any impact or 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 yet been solicited or received. MBSCC will notify the Commission of any written comments received by MBSCC.

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 MBSCC consents, the Commission will:

- (a) By order approve the 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 is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 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

Section, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of MBSCC. All submissions should refer to File No. SR-MBSCC-2001-06 and should be submitted by April 17, 2002.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.³

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45602; File No. SR-NYSE-2001-40]

Self-Regulatory Organizations; Notice of Filing of a Proposed Rule Change and Amendment No. 1 and Amendment No. 2 Thereto by the New York Stock Exchange, Inc. Regarding Method of Delivery of Annual Reports and Proxy Materials

March 20, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 11, 2001, the New York Stock Exchange, Inc. ("Exchange" or "NYSE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which items have been prepared by the NYSE. The Exchange submitted Amendment No. 1 to the proposed rule change on January 15, 2002.³ The Exchange submitted Amendment No. 2 to the proposed rule change on March 5, 2002.⁴ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ In Amendment No. 1, NYSE made technical changes to its rule text. See letter to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, from Darla C. Stuckey, Corporate Secretary, NYSE, dated January 11, 2002 ("Amendment No. 1").

⁴ In Amendment No. 2, NYSE made additional minor technical changes to its rule text. See letter to Nancy Sanow, Assistant Director, Division, Commission, from Darla C. Stuckey, Corporate Secretary, NYSE, dated March 4, 2002 ("Amendment No. 2").

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

The Exchange proposes to amend Sections 203.01, 204.04, 402.04, and 402.10 of the Exchange's Listed Company Manual ("Manual") in respect of method of delivery of annual reports and proxy materials. The proposed amendment will specify that annual reports and proxy materials should be distributed in such format and by such methods as are permitted or required by applicable law and regulations. Below is the text of the proposed rule change. Proposed new language is italicized; deletions are in brackets.

Listed Company Manual

203.00 Annual and Interim Reporting Requirements

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203.01 Annual Report Requirement

The Exchange requires that companies publish at least once a year and distribute to shareholders an annual report containing financial statements of the company and its consolidated subsidiaries prepared in conformity with generally accepted accounting principles. The company must distribute its annual report to its shareholders not later than 120 days (225 days for Non-US issuers) after the close of each fiscal year. Notwithstanding the foregoing, domestic issuers must make this distribution at least fifteen days in advance of the annual meeting. (Non-US issuers are encouraged to do so when possible.) When the annual report is [mailed] *distributed* to shareholders, two copies should be sent to the Exchange together with advice as to the date of [mailing] *distribution* to shareholders.

Companies may satisfy the annual distribution requirement either by distributing an annual report to shareholders, or by distributing to shareholders the Form 10-K (or Form 20-F for Non-US issuers) filed with the SEC, with an indication that it is distributed in lieu of a separate annual report. When the annual report (or Form 10-K or Form 20-F) is *distributed* [mailed] to shareholders, two copies should be sent to the Exchange, together with advice as to the date of *distribution* [mailing] to shareholders. Distribution *shall be in such format and by such means as permitted or required by applicable law and regulation (including any interpretations thereof by the SEC)*. ([s]See, for example, [materials referenced in Listed Company Manual section 402.04(B)] *the following*

interpretations by the SEC: Release No. 34-36345; File No. S7-31-95; Release No. 34-37182, File No. S7-13-96; and Release No. 34-42728, File No. S7-11-00. [by electronic means (including by posting on the company's web site) will be effective only as to beneficial holders who have given their prior consent to receiving the report in that form. Such consent must be in writing, which may be in the form of electronic mail.]

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(A) through (D)—No change.

(E) Occasional Delay in Issuance of Statements.

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So far as the [three months time limit of the listing agreement] *120 day (225 day) time limit stated in the first paragraph of this Section 203.01* is concerned, the Exchange, while ready to extend such time limit on the basis of necessity, does not feel free to do so on the basis of convenience. For example it cannot consent to a delay in the issuance of the statements just to make possible their simultaneous *distribution* [mailing] with the proxy material.

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204.00 Notices by the Company to the Exchange

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204.04 Annual Report

The Exchange requires that two copies of the company's annual report be provided to the Exchange when it is [mailed] *distributed* to shareholders. These reports should be accompanied by notice to the Exchange as to the date [mailed] *distributed* to shareholders.

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402.00 Proxies

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402.04 Proxy Solicitation Required

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(B) *Proxy materials shall be in such format and shall be distributed by such means as are permitted or required by applicable law and regulation (including any interpretations thereof by the SEC)*. [Electronic Delivery of Proxy Materials. As permitted by applicable state and federal law (including any interpretations thereof by the SEC) a company may arrange for the delivery of its proxy material by electronic means (including by posting on company's web site with an electronic mail notice to the beneficial owner of its availability on the web site) to beneficial owners who have given prior written consent to such a delivery. Such consent may be in the form of electronic mail. Such arrangements should be made in

coordination with any intermediaries that are record holders of the securities. Proxies may also be delivered by electronic means by beneficial owners as permitted by applicable state and federal law (including any interpretation thereof by the SEC) and if appropriate arrangements have been made with any intermediaries that are record holders of the securities.] (See, for example, the following interpretations by the SEC: Release No. 34-36345; File No. S7-31-95; Release No. 34-37182, File No. S7-13-96; and Release [Nos. 33-7856,] *No. 34-42728, File No. S7-11-00*). *Companies should also note the NYSE Rules (451 and 465) applicable to members and member organizations regarding the furnishing of annual reports and proxy materials to account holders.*

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402.10 Charges by Member Organizations for Distributing Material

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(A) through (B) No change.

(C) Charges for Interim Report *Distributions* [Mailings].

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"Householding" of Reports

Rules 451 and 465 require member organizations to transmit issuer-supplied annual reports, interim reports, proxy statements and other material to beneficial owners. Member organizations are not required to transmit more than one annual report, interim report, proxy statement or other material to beneficial owners with more than one account (including trust accounts). In addition, member organizations may eliminate multiple transmissions or reports, statements or other materials to beneficial owners having the same address, provided *they comply with applicable SEC rules with respect thereto (see SEC Rule 14b-1 under the Securities Exchange Act of 1934)*. [that (i) at least one such report or statement is transmitted to a beneficial owner at that address; and (ii) any beneficial owner having that address, to whom a report is not sent, has agreed thereto in writing.]

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

In its filing with the Commission, the NYSE 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. The NYSE 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

In 1999, the Exchange filed amendments to Section 203 of the Manual clarifying that listed companies were permitted to make electronic delivery of annual reports to beneficial holders, as long as beneficial holders had given prior written consent to such delivery. The Commission approved the rule change in March 2000.⁵

Last year, the Exchange filed an amendment to Section 402.04 of the Manual extending the same electronic delivery option to delivery of proxies and proxy material, subject to the same affirmative written assent from beneficial holders.⁶ Responding to comments from the Commission staff, the Exchange modified the proposed amendment to specify that companies arranging for the electronic delivery of proxy materials must do so as permitted by and in compliance with applicable state and federal law, including any applicable interpretation by the Commission.⁷ The amended rule change was approved by the Commission in March 2001.⁸

Thereafter, the Exchange received comments from listed companies maintaining that the Exchange's requirement of prior written consent for delivery of proxy materials to beneficial holders is more restrictive than the prerequisites contained in the Commission's current interpretations. The Exchange has also been asked whether delivery of these materials on a compact disk is permissible, and whether delivery of a CD by mail is delivery of the information by electronic means.

The Exchange staff discussed all of the foregoing with the Exchange's Legal Advisory Committee ("LAC") in June of this year. Specifically, it was noted that

the Commission in effect had pre-empted the field in terms not only of the content of proxy material and the annual report, but also in regulating delivery of the material to investors, issuing specific interpretations since 1995. The LAC agreed that in view of this, it is advisable for the Exchange to cease attempting to legislate for listed companies how they must act in this regard. Accordingly, as recommended by the LAC, the Exchange proposes to eliminate from Section 402.04 any specific requirements regarding the format and method of delivery, specifying instead that companies should distribute proxy materials in such format and by such methods as are permitted or required by applicable law and regulations. To be helpful the Exchange will retain the informational references to the applicable Commission interpretive releases, and will cross-reference the Exchange's rules 451 and 465 applicable to members and member organizations when they furnish information to account holders. To be consistent, the Exchange also proposes to make similar amendments to Sections 203.01 and 204.04, dealing with annual reports.

Finally, the Exchange is proposing to make housekeeping changes to Section 203.01(E) of the Manual relating to time limits for the delivery of annual reports and to Section 402.10 of the Manual relating to householding of reports to conform to related rule changes effected last year.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Exchange Act,⁹ in general, and furthers the objectives of Section 6(b)(5),¹⁰ in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

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

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

Within 35 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 90 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 NYSE consents, the Commission will:

(A) by order approve the 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, as amended, is consistent with the Exchange Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 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 the principal office of the NYSE. All submissions should refer to File No. SR-NYSE-2001-40 and should be submitted by April 17, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Margaret H. McFarland,

Deputy Secretary.

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⁵ See Securities Exchange Act Release No. 42574 (March 24, 2000), 65 FR 17326 (March 31, 2000).

⁶ File No. SR-NYSE-2000-21.

⁷ Applicable Commission interpretations, which are cited in Section 402.04, as amended, include October 1995 Release *Use of Electronic Media for Delivery Purposes*; May 1996 Release *Use of Electronic Media by Broker-Dealers, Transfer Agents and Investment Advisers for Delivery of Information*; and April 2000 Release *Delivery of Proxy Statements and Information to Households*. (Release No. 34-36345, File No. S7-31-95; Release No. 34-37182, File No. S7-13-96; Release No. 34-42728, File No. S7-11-00.)

⁸ Securities Exchange Act Release No. 44133, 66 FR 18134 (April 5, 2001).

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ 17 CFR 200.30-3(a)(12).