

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59463; File No. SR-FICC-2009-02)

February 26, 2009

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change To Allow For Direct Membership for Non-Domestic Entities

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder² notice is hereby given that on February 19, 2009, the Fixed Income Clearing Corporation (“FICC”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change as described in Items I and II below, which Items have been prepared primarily by FICC. The Commission is publishing this notice and order to solicit comments on the proposed rule change from interested persons and to approve the proposed rule change on an accelerated basis.

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

The proposed rule change allows direct membership for non-U.S. entities in FICC’s Government Securities Division (“GSD”).

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

In its filing with the Commission, FICC 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. FICC has prepared summaries, set forth in sections A, B, and C below, of the most

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

significant aspects of such statements.

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

Currently, GSD Rule 2 (“Members”) includes a broad category for “foreign netting members.” GSD Rule 2A (“Initial Membership Requirements”) sets forth membership criteria for these firms and includes, among other requirements, that the entity be regulated in its home country by a financial regulatory authority and that it be in compliance with the financial reporting and responsibility standards set by its home country regulator.

FICC has designed its rules and various membership agreements to minimize the risks posed by the admission of non-domestic entities by availing itself of the benefits and protections of various U.S. state and federal bankruptcy rules and regulations. With this approach, FICC has historically accepted only foreign banks with U.S. branches or agencies into the “foreign netting member” category of GSD membership. While this is not technically a requirement in GSD’s current rules, FICC imposed this limitation because of various state and federal bankruptcy law “safe harbors” that would apply to a U.S. branch’s assets should a non-domestic member become insolvent. These safe harbors include “ring fencing” provisions that would set aside a U.S. branch’s assets for distribution to the branch’s creditors³ and procedures designed to protect creditors in the case of a foreign entity’s default, including recognizing security interests and netting agreements, and rights to access member-posted collateral.⁴

³ The NY ring-fence law is Section 606, subsection 4, of the NYBL. Currently, FICC has an Illinois branch of a foreign bank as a member. FICC represents that the Illinois ring fence law is identical to New York’s ring fence law.

⁴ See Sections 403 and 404 of the Federal Deposit Insurance Corporation Improvement Act, 12 U.S.C. 4403(a) and 4404(a) (confirming the enforceability of bilateral netting contracts and clearing organization netting contracts, notwithstanding other provisions of federal law, by

Recently, U.S. bankruptcy laws have expanded the reach of federal safe harbors to non-U.S. entities without a U.S. branch or agency.⁵ FICC believes that these statutory changes strengthen FICC's ability to access and secure collateral posted at FICC by an insolvent non-U.S. member without a domestic branch by providing protection similar to that which applies to a U.S. member or branch or agency of a non-U.S. member.⁶

This rule filing will remove references in GSD's rules to domestic branches or agencies with respect to foreign members, thereby facilitating "direct" membership for these entities at GSD.⁷ Non-U.S. applicants will still be required to meet the minimum financial requirements set forth in GSD Rule 2A for foreign netting members⁸ and those entities accepted into membership will be required to comply with all rule provisions applicable to foreign netting

ensuring that parties can exercise termination, liquidation, and acceleration rights, as well as netting rights, under a netting contract).

⁵ FICC believes that Section 561 of the bankruptcy code makes it clear that the bankruptcy code's safe harbor provisions now apply to "ancillary proceedings." Ancillary proceedings, discussed in Chapter 15 of the bankruptcy code, refer to an attempt by a foreign liquidator to present itself in a U.S. court to institute proceedings to attempt to apply adverse foreign law to determine the disposition of the estate of a non-U.S. entity.

⁶ Historically, FICC's concern centered on ancillary proceedings that might be brought by a foreign liquidator in a U.S. bankruptcy court seeking to apply foreign law to the disposition of an insolvent foreign member's assets. The U.S. Bankruptcy Code has been amended to provide that the safe harbors are available in such a proceeding, which was not that case prior to the recent amendments of the bankruptcy code.

⁷ The Commission has approved similar rule filings submitted by The Depository Trust Company and the National Securities Clearing Corporation. Securities Exchange Act Release Nos. 58345 (Aug. 12, 2008), 73 FR 48411 (Aug. 19, 2008) [File No. SR-DTC-2007-16] and 58344 (Feb. 27, 2008), 73 FR 12485 (Mar. 7, 2008) [File No. SR-NSCC-2007-15].

⁸ GSD's rules state that if an applicant is a foreign entity that is applying to become a "foreign netting member", it must satisfy the minimum financial requirements (defined by reference to regulatory capital as defined by the applicant's home country regulator) that are applicable to the netting system membership category that the FICC determines would be applicable to the foreign firm if it were organized or established under U.S. law.

members.

FICC believes that the proposed rule filing is consistent with the requirements of Section 17A of the Act⁹ and the rules and regulations thereunder applicable to FICC because it does not adversely affect the safeguarding of securities or funds in FICC's control or for which it is responsible.

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

FICC 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

FICC has not solicited or received written comments relating to the proposed rule change. FICC will notify the Commission of any written comments it receives.

III. 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. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-FICC-2009-02 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and

⁹ 15 U.S.C. 78q-1.

Exchange Commission, Station Place, 100 F Street, NE, Washington, DC, 20549-1090.

All submissions should refer to File No. SR-FICC-2009-02. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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, 450 Fifth Street, NW, Washington DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. Copies of such filing also will be available for inspection and copying at FICC's principal office and on FICC's Web site at <http://ficc.com/gov/gov.docs.jsp?NS-query=#rf>. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submission should refer to File No. SR-FICC-2009-02 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to FICC. Specifically, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(A) of the Act,¹⁰ which

¹⁰ 15 U.S.C. 78q-1(b)(3)(A).

requires, among other things, that FICC, as a registered clearing agency, be so organized and has the capacity to be able to safeguard securities and funds in its custody or control or for which it is responsible. The Commission notes that the proposed rule change adopts membership standards and safeguards that are substantively identical to those of the National Securities Clearing Corporation and The Depository Trust Company, which were published for comment in 2008 and generated no comments.¹¹ The Commission does not believe that this proposal raises new regulatory issues. Moreover, the changes in U.S. bankruptcy laws cited by FICC appear to have strengthened FICC's ability to secure the funds and securities pledged as collateral by a non-U.S. entity to FICC in the event that such entity were to become insolvent. Therefore, the proposed rule change should enhance FICC's capacity to safeguard securities and funds in its custody or control or for which it is responsible.

At FICC's request, the Commission finds good cause to approve the proposed rule change prior to the thirtieth day after the date of publication of notice in the Federal Register, pursuant to Section 19(b)(2) of the Act.¹² The Commission believes that accelerating approval of this proposal is appropriate in that the proposed rule change is substantively identical to rules proposed by FICC-affiliated clearing agencies and approved by the Commission in 2008,¹³ and that it will allow prospective non-U.S. entities that wish to avail themselves of FICC's clearance and settlement, cost-savings, and risk-management services without undue delay.

V. Conclusion

¹¹ Supra, note 7.

¹² 15 U.S.C. 78s(b).

¹³ Supra, note 7.

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act¹⁴ and the rules and regulations thereunder.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁵ that the proposed rule change (SR-FICC-2009-02) be and hereby is approved on an accelerated basis.¹⁶

For the Commission by the Division of Trading and Markets pursuant to delegated authority.¹⁷

Florence E. Harmon
Deputy Secretary

¹⁴ 15 U.S.C. 78q-1.

¹⁵ 15 U.S.C. 78s(b)(2).

¹⁶ In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

¹⁷ 17 CFR 200.30-3(a)(12).