

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49048; File No. SR-FICC-2003-09]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Proposed Rule Change To Establish a Comprehensive Standard of Care and Limit the Mortgage-Backed Securities Division's Liability to Its Participants

January 9, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ notice is hereby given that on August 19, 2003, the Fixed Income Clearing Corporation ("FICC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change described in Items I, II, and III below, which items have been prepared primarily by FICC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

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

FICC is seeking to establish a comprehensive standard of care and limitation of liability with respect to participants of the Mortgage-Backed Securities Division ("MBSD").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, 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 significant aspects of these statements.³

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

FICC is seeking to establish a comprehensive standard of care and limitation of liability for the participants of MBSD that is identical to that of FICC's Government Securities Division ("GSD").⁴ Historically, the Commission has left to user-governed clearing agencies the question of how to allocate losses associated with, among other things, clearing agency functions.⁵ The Commission has reviewed clearing agency services on a case-by-case basis and in determining the appropriate standard of care has balanced the need for a high degree of clearing agency care with the effect the resulting liabilities may have on clearing agency operations, costs, and safekeeping of securities and funds.⁶ Because standards of care represent an allocation of rights and liabilities between a clearing agency and its participants, which are sophisticated financial entities, the Commission has refrained from establishing a unique federal standard of care and has allowed clearing agencies and other self-regulatory organizations and their participants to establish their own standard of care.⁷

MBSD rules already provide for a standard of care similar to that now provided for in the GSD rules. The proposed rule changes make this provision identical to that of the GSD. Thus, in addition to being responsible to participants for gross negligence and willful misconduct, the proposed rule changes provide that MBSD will be liable for direct losses caused by its violation of Federal securities laws for which there is a private right of action. Also, MBSD will not be liable for the acts or omissions of third parties unless MBSD was grossly negligent, engaged in willful misconduct, or in violation of Federal securities laws for which there is a private right of action in selecting such third party. Moreover, the proposed changes will relieve MBSD of any liability for consequential and other indirect damages. By making these changes to MBSD rules, both GSD and MBSD rules will be identical, lending

consistency to FICC's approach to these issues.

FICC believes that adopting a uniform rule⁸ limiting FICC's liability to its members to direct losses caused by FICC's gross negligence, willful misconduct, or violation of Federal securities laws for which there is a private right of action: (a) Memorializes an appropriate commercial standard of care that will protect FICC from undue liability; (b) permits the resources of FICC to be appropriately utilized for promoting the accurate clearance and settlement of securities; and (c) is consistent with similar rules adopted by other self-regulatory organizations and approved by the Commission.⁹

FICC believes that the proposed rule change is consistent with the requirements of section 17A of the Act¹⁰ and the rules and regulations thereunder applicable to FICC because it will permit the resources of FICC to be appropriately utilized for promoting the accurate clearance and settlement of securities.

(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.

⁸ The proposed rule language for MBSD Clearing Rules Article V, Rule 6, Sections 1(a) and (b) and for MBSD EPN Rulebook Article X, Rule 6, Sections 1(a) and (b) is as follows:

(a) The Corporation will not be liable for any action taken, or any delay or failure to take any action, hereunder or otherwise to fulfill the Corporation's obligations to its Participants [EPN users and Participants], other than for losses caused directly by the Corporation's gross negligence, willful misconduct, or violation of Federal securities laws for which there is a private right of action. Under no circumstances will the Corporation be liable for the acts, delays, omissions, bankruptcy, or insolvency, of any third party, including, without limitation, any depository, custodian, sub-custodian, clearing or settlement system, transfer agent, registrar, data communication service or delivery service ("Third Party"), unless the Corporation was grossly negligent, engaged in willful misconduct, or in violation of Federal securities laws for which there is a private right of action in selecting such Third Party; and

(b) Under no circumstances will the Corporation be liable for any indirect, consequential, incidental, special, punitive or exemplary loss or damage (including, but not limited to, loss of business, loss of profits, trading losses, loss of opportunity and loss of use) howsoever suffered or incurred, regardless of whether the Corporation has been advised of the possibility of such damages or whether such damages otherwise could have been foreseen or prevented.

⁹ See, e.g., Securities Exchange Act Release Nos. 37421 (July 11, 1996), 61 FR 37513 [SR-CBOE-96-02] and 37563 (August 14, 1996), 61 FR 43285 [SR-PSE-96-21].

¹⁰ 15 U.S.C. 78q-1.

¹ 15 U.S.C. 78s(b)(1).

² On January 1, 2003, MBS Clearing Corporation ("MBSCC") was merged into the Government Securities Clearing Corporation ("GSCC") and GSCC was renamed FICC. The functions previously performed by GSCC are now performed by the Government Securities Division ("GSD") of FICC, and the functions previously performed by MBSCC are now performed by MBSD of FICC. Securities Exchange Act Release No. 47015 (December 17, 2002), 67 FR 78531 [File Nos. SR-GSCC-2002-09 and SR-MBSCC-2002-01].

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

⁴ The Commission approved identical rule language for GSD establishing a comprehensive standard of care and limitation of liability to its members. Securities Exchange Act Release No. 48201 (July 21, 2003), 68 FR 44128 [File No. SR-GSCC-2002-10].

⁵ Securities Exchange Act Release Nos. 20221 (September 23, 1983), 48 FR 45167 and 22940 (February 24, 1986), 51 FR 7169.

⁶ *Id.*

⁷ *Id.*

(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. FICC will notify the Commission of any written comments received by FICC.

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, NW., Washington, DC 20549-0609. Comments may also be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-FICC-2003-09. 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, comments should be sent in hardcopy or by e-mail but not by both methods. 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 also will be available for inspection and copying at the principal

office of FICC and on FICC's Web site at <http://www.ficc.com>.

All submissions should refer to File No. SR-FICC-2003-09 and should be submitted by February 5, 2004.

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

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49043; File No. SR-OCC-2003-02]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Confidential Treatment of Certain Information

January 8, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ notice is hereby given that on June 3, 2003, The Options Clearing Corporation ("OCC") 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 primarily by OCC. 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 amends as set forth in a policy statement OCC's obligation with regard to the confidential treatment of certain information provided to OCC by markets to which OCC provides clearing and settlement services.

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

In its filing with the Commission, OCC 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. OCC has prepared summaries, set forth in sections (A), (B),

and (C) below, of the most significant aspects of such statements.²

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

OCC has recently entered into clearing agreements with Nasdaq LIFFE Markets, LLC ("NqLX")³ and with Island Futures Exchange, LLC ("IFX")⁴ in connection with security futures and in the case of NqLX, with futures and futures options on broad-based indexes traded on these participant markets. These agreements include confidentiality provisions protecting confidential information provided by one party from unauthorized use or disclosure by the other party. OCC has also entered into a clearing agreement with OneChicago, LLC ("OCX")⁵ which does not contain confidentiality provisions. Similarly, there are no confidentiality provisions in the restated participant exchange agreement among OCC and the various options markets. OCC is currently discussing a clearing agreement with CBOE Futures Exchange, LLC, and CBOE has requested that confidentiality provisions be included.

In order to assure that all participant markets have the same rights protecting confidential information disclosed to OCC and to avoid the need to negotiate the terms of confidentiality agreements with current and future participant markets on a case by case basis, OCC proposes to publish a policy statement with regard to confidential information disclosed to it by participant markets ("Policy Statement"). The Policy Statement will not be incorporated into the by-laws. OCC intends that the Policy Statement be enforceable against OCC by the participant markets.

The Policy Statement reflects OCC's longstanding practice and express understanding with the various markets using its clearing services. OCC has always protected the confidentiality of new product information and other information provided to it by the markets, and the Policy Statement merely provides a uniform statement of that policy for the benefit of all markets. OCC's confidentiality obligations under the Policy Statement are substantially

² The Commission has modified parts of these statements.

³ Securities Exchange Act Release No. 46722 (October 25, 2002), 67 FR 67230 (November 4, 2002) [File No. SR-OCC-2002-13].

⁴ Securities Exchange Act Release No. 46058 (June 10, 2002), 67 FR 41287 (June 17, 2002) [File No. SR-OCC-2002-08].

⁵ Securities Exchange Act Release No. 46653 (October 11, 2002), 67 FR 64689 (October 21, 2002) [File No. SR-OCC-2002-07].

¹¹ 17 CFR 200.30-3(a)(12).

¹⁵ U.S.C. 78s(b)(1).