

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 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 Number SR-CBOE-2005-71 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303.

All submissions should refer to File Number SR-CBOE-2005-71. 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, as amended, that are filed with the Commission, and all written communications relating to the proposed rule change, as amended, 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 also will be available for inspection and copying at the principal office of the CBOE. 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 submissions should refer to File Number SR-CBOE-2005-71 and should be submitted on or before November 16, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁸

Jonathan G. Katz,

Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-52631; File No. SR-FICC-2005-14]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of a Proposed Rule Change Relating to the Federal Reserve's National Settlement System

October 18, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ notice is hereby given that on September 9, 2005, Fixed Income Clearing Corporation ("FICC") 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 FICC. 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 would amend the rules of FICC's Government Securities Division ("GSD") to have funds-only settlement obligation payment processing occur through the Federal Reserve's National Settlement System ("NSS").

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 such statements.²

¹⁸ 17 CFR 200.30-3(a)(12).

¹⁵ 15 U.S.C. 78s(b)(1).

² The Commission has modified parts of these statements.

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

The purpose of the proposed rule change is to amend the rules of GSD to require netting members to satisfy their funds-only settlement amounts ultimately through the Federal Reserve's NSS.³ GSD's funds-only settlement process is set forth in GSD Rule 13. On a daily basis, FICC reports a funds-only settlement amount, which is either a debit amount or a credit amount, to each netting member. Each netting member that has a debit is required to satisfy its obligation by the applicable deadline. Netting members with credits are subsequently paid by FICC by the applicable deadline. All payments of funds-only settlement amounts by a netting member to FICC and all collections of funds-only settlement amounts by a netting member from FICC are done through depository institutions that are designated by such netting member and FICC to act on their behalves with regard to such payments and collections. All payments are made by fund wires from one depository institution to the other.

In 1997, the Commission approved an enhancement to GSCC's⁴ funds-only settlement payment processing ("1997 Filing").⁵ This enhancement gave members the option to participate in an auto-debit arrangement that was to eliminate the need to send fund wires for the satisfaction of funds-only settlement payments. Under the auto-deposit arrangement, GSCC, the netting member, and the netting member's depository institution would enter into a "funds-only settlement procedures agreement" whereby the depository institution would pay or collect funds-only settlement amounts on behalf of the netting member and GSCC through accounts of the member at the depository institution. As a result, the

³ This is consistent with the manner in which FICC's affiliates, The Depository Trust Company ("DTC") and the National Securities Clearing Corporation ("NSCC"), handle their funds settlement process. DTC and NSCC do not currently use NSS for the processing of funds credits, whereas FICC is proposing to have the GSD process both the debits and credits of its funds-only settlement process through NSS.

⁴ The Government Securities Clearing Corporation ("GSCC") was the predecessor to GSD. GSCC became the GSD division of FICC when GSCC and the Mortgage Backed Securities Clearing Corporation were merged to create FICC in 2002.

⁵ Securities Exchange Act Release No. 39309 (November 7, 1997), 62 FR 61158 (November 14, 1997) [File No. SR-GSCC-97-06].

need for fund wire payments would be eliminated.⁶

The proposed rule change will replace the auto-debit process of the 1997 Filing and will provide even further enhancements to the current approach to payment processing than was envisioned by the 1997 Filing. Under the proposed rule change, the required payment mechanism for the satisfaction of funds-only settlement amounts will be the NSS. FICC will appoint The Depository Trust Company ("DTC") as its settlement agent for purposes of interfacing with the NSS.⁷

In order to satisfy their funds-only settlement obligations through the NSS process, netting members must appoint banks or trust companies to act as their "funds-only settling banks." A netting member that qualifies may act as its own funds-only settling bank.

The GSD will establish a limited membership category for the funds-only settling banks. Banks or trust companies that are DTC settling banks, as defined in DTC's rules and procedures, or that are GSD netting members with direct access to the Federal Reserve and the NSS will be eligible to become GSD funds-only settling bank members by executing the requisite membership agreement for this purpose. Other banks or trust companies that desire to become funds-only settling bank members must apply to FICC. They must also have direct access to a Federal Reserve Bank and the NSS as well as satisfy the financial responsibility standards imposed by FICC from time to time. Initially, these applicants must meet and maintain a Tier 1 capital ratio of 6 percent.⁸

In addition to the membership agreement, the funds-only settling bank and the netting member must execute an agreement whereby the member will appoint the bank to act on its behalf for funds-only settlement purposes. The bank must also execute any agreements required by the Federal Reserve Bank for participation in the NSS for FICC's funds-only settlement process.

The funds-only settling banks will be required to follow the procedures for funds-only settlement payment processing set forth in FICC's proposed

new rules. This will include, for example, providing FICC or its settlement agent with the requisite acknowledgement of the bank's intention to settle the funds-only settlement amounts of the netting members it represents on a timely basis and participating in the NSS process. Funds-only settling banks will have the right to refuse to settle for a particular netting member and will also be able to opt out of NSS for one business day if they are experiencing extenuating circumstances.⁹ Under FICC's proposal, the netting member shall be responsible for ensuring that its funds-only debit is wired to the depository institution designated by FICC for this purpose by the payment deadline. The proposed rule change makes clear that the obligation of a netting member to fulfill its funds-only settlement amount remains at all times with the netting member.

As FICC's settlement agent, DTC will submit instructions to have the Federal Reserve Bank accounts of the funds-only settlement banks charged for the debit amounts and credited for the credit amounts. Utilization of NSS will eliminate the need for the initiation of wire transfers in satisfaction of funds-only settlement amounts, and FICC believes that it will therefore reduce the risk that the netting member that designated the bank may incur a late payment fine due to delay in wiring funds. The proposal will also reduce operational burden for the operations staff of FICC.

The NSS is governed by the Federal Reserve's Operating Circular No. 12 ("Circular"). Under the Circular, DTC, as FICC's settlement agent, has certain responsibilities with respect to an indemnity claim made by a relevant Federal Reserve Bank as a result of the NSS process. FICC will apportion the entirety of any such liability to the netting members for whom the funds-only settling bank to which the indemnity claim relates was acting. This allocation will be done in proportion to the amount of such members' funds-only settlement amounts on the business day in question. If for any reason such allocation is not sufficient to fully satisfy the Federal Reserve Bank's indemnity claim, the remaining loss shall be treated as an "Other Loss" as defined by the GSD's Rule 4 and allocated accordingly.

The proposed rule change will not change the current GSD deadlines regarding the payment and receipt of

funds-only settlement amounts, which are set forth in the GSD's rules.

FICC believes the proposed rule change is consistent with the requirements of Section 17A of the Act, and the rules and regulations thereunder because it will enhance the current operation of the GSD's funds-only settlement payment process by promoting the timely processing of funds payments and credits. As such, the proposed rule change should support the prompt and accurate clearance and settlement of securities transactions.

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

FICC does not believe that the proposed rule change would 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 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 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 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 Number SR-FICC-2005-14 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary,

⁶ This was a voluntary arrangement that was never implemented because until recently GSCC and then GSD continued to make manual adjustments to the final funds-only settlement amounts of netting members. These manual adjustments have recently largely been eliminated.

⁷ DTC currently performs this service for NSCC.

⁸ This is the same financial requirement for NSCC settling bank-only members. Under FICC's proposal, FICC would retain the discretion to change this financial criterion by providing advanced notice to the fund-only settling banks and the netting members through important notice.

⁹ These procedures are consistent with the NSCC and DTC procedures in this respect.

Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303.

All submissions should refer to File Number SR-FICC-2005-14. 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 Section, 100 F Street, NE., 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 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 submissions should refer to File Number SR-FICC-2005-14 and should be submitted on or before November 16, 2005.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.¹⁰

Jonathan G. Katz,

Secretary.

[FR Doc. E5-5943 Filed 10-25-05; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-52637; File No. SR-NASD-2004-026]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Amendments No. 3 and 4 to Proposed Rule Change To Amend NASD Rule 2320(a) Governing Best Execution

October 19, 2005.

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 June 22 and September 22, 2005, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("Commission" or "SEC") Amendments No. 3 and 4 to the proposed rule change as described in Items I, II, and III below which Items have substantially been prepared by the NASD. The proposed rule change, incorporating Amendments No. 1 and 2, was published for comment in the **Federal Register** on February 25, 2005.³ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended by Amendments No. 3 and 4 from interested persons.

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

In response to comments on the original proposal, NASD is proposing additional amendments to Rule 2320(a) ("Best Execution Rule"). Below is the text of the proposed rule change marked to show changes from the text that was published previously.⁴ Proposed deletions are in brackets. The discussion section of this notice focuses on the changes made in Amendments No. 3 and 4. For an explanation of the original filing, see the release cited in footnote 3.

2300. TRANSACTIONS WITH CUSTOMERS

2320. Best Execution and Interpositioning

(a) In any transaction for or with a customer or a customer of another broker-dealer, a member and persons associated with a member shall use reasonable diligence to ascertain the best market [center] for the subject security and buy or sell in such market [center] so that the resultant price to the customer is as favorable as possible under prevailing market conditions. Among the factors that will be considered in determining whether a member has used "reasonable diligence" are:

- (1) The character of the market for the security, e.g., price, volatility, relative liquidity, and pressure on available communications;
- (2) The size and type of transaction;
- (3) The number of markets checked;
- (4) Accessibility of the quotation; and

(5) The terms and conditions of the order which result in the transaction, as communicated to the member and persons associated with the member.

(b) through (g) No change.

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

In its filing with the Commission, NASD 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. NASD 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

Background

The Best Execution Rule currently requires a member, in any transaction for or with a customer, to use reasonable diligence to ascertain the best inter-dealer market for a security and to buy or sell in such a market so that the price to the customer is as favorable as possible under the prevailing market conditions. NASD has received a number of questions regarding the application of the term "customer," in the context of best execution. NASD Rule 0120(g) defines "customer" to exclude a broker or dealer, unless the context otherwise requires. For example, if a firm that receives an order from a customer ("originating broker-dealer") routes the order to a member firm ("recipient member") and the recipient member executes the order in a manner inconsistent with the Best Execution Rule, the recipient member could argue that it has not violated the Best Execution Rule because the transaction was not "for or with a customer," but rather for or with a broker-dealer.

NASD believes that not applying the Best Execution Rule to recipient members is contrary to both the interests of the investing public and the general intent of the Best Execution Rule.

Proposal

NASD filed Amendments No. 3 and 4 in response to the commenters' concerns about how the proposed rule change would apply to the debt markets

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 51229 (Feb. 18, 2005), 70 FR 9416.

⁴ *Id.*

¹⁰ CFR 200.30-3(a)(12).