

affect the amount of Section 31 fees that NASD will owe the Commission.<sup>22</sup> Therefore, the Commission believes that granting NASD's request for relief from the requirements of Rules 31 and 31T and Form R31 with respect to away-from-the-market covered sales occurring in July 2004 is necessary or appropriate in the public interest and consistent with the protection of investors. After August 2004, NASD must report away-from-the-market covered sales occurring in a given month in the Form R31 due by the tenth business day of the following month, as required by Rule 31.

#### IV. Conclusion

It is hereby ordered, pursuant to section 36 of the Exchange Act, that NASD: (1) May use the report date rather than the trade date as the charge date of any covered sale reported to NASD "as-of"; (2) is not required to include in its Form R31 submissions for the months September 2003 to July 2004, inclusive, the aggregate dollar amount of any away-from-the-market covered sales; and (3) may report in its August 2004 Form R31 the aggregate dollar amount of away-from-the-market covered sales that occurred in July 2004 and August 2004.

By the Commission.

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50399; File No. SR-DTC-2004-09]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the By-Laws of The Depository Trust Company

September 16, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on September 7, 2004, the Depository Trust Company ("DTC") 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 DTC. 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

The proposed rule change consists of changes to the By-Laws of The Depository Trust Company ("DTC") to provide for indemnity for non-director members of DTC board committees.

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

In its filing with the Commission, DTC 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. DTC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.<sup>2</sup>

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

In order to help assure the fair representation of the users of DTC, the DTC board of directors has delegated significant responsibilities to the DTC Equity Operations and Planning Committee, the DTC Fixed Income Operations and Planning Committee, and the DTC Membership and Risk Management Committee and has appointed to these committees, in addition to directors, non-director DTC-user representatives.<sup>3</sup>

The purpose of the proposed rule change is to revise DTC's By-Laws to specify that non-director members of DTC board committees will be indemnified in the same manner as DTC directors and officers.

DTC believes that the proposed rule change is consistent with the requirements of section 17A of the Act<sup>4</sup> and the rules and regulations thereunder applicable to DTC because the proposed change strengthens DTC's board committee structure and thereby helps DTC provide its participants with

<sup>2</sup> The Commission has modified the text of the summaries prepared by DTC.

<sup>3</sup> The changes to the DTC By-Laws are modeled on the current indemnification provisions contained in the By-Laws of both the Fixed Income Clearing Corporation and Emerging Markets Clearing Corporation. The National Securities Clearing Corporation has filed a proposed rule change similar to this proposed rule change. Securities Exchange Act Release No. 50398 (September 16, 2004) (File No. SR-NSCC-2004-05).

<sup>4</sup> 15 U.S.C. 78q-1.

fair representation in the administration of its affairs.

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

DTC perceives no impact on competition by reason of the proposed rule change.

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

Written comments from DTC participants or others have not been solicited or received on the proposed rule change.

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

The foregoing rule change has become effective upon filing pursuant to section 19(b)(3)(A)(iii) of the Act<sup>5</sup> and Rule 19b-4(f)(3)<sup>6</sup> thereunder because the proposed rule is concerned solely with the administration of DTC. At any time within 60 days of the filing of such rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### 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](mailto:rule-comments@sec.gov). Please include File Number SR-DTC-2004-09 on the subject line.

##### Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-DTC-2004-09. 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, please use

<sup>5</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>6</sup> 17 CFR 240.19b-4(f)(3).

<sup>22</sup> July 2004 and August 2004 are in the same billing period and the same fee rate applies to covered sales occurring in these months.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

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, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of DTC and on DTC's Web site at <http://www.dtc.org>. 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-DTC-2004-09 and should be submitted on or before October 13, 2004.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>7</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50392; File No. SR-FICC-2003-14]

### Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Approving a Proposed Rule Change Relating to Amending Impractical or Inconsistent Rules and Adding Rules To Protect the Clearing Corporation and Its Members

September 15, 2004.

On November 17, 2003, the Fixed Income Clearing Corporation ("FICC") filed with the Securities and Exchange Commission ("Commission") a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> (File No. SR-FICC-2003-14) and on January 15, 2004, and March 3, 2004, amended the proposed rule change. Notice of the proposal was published in the **Federal**

**Register** on March 23, 2004.<sup>2</sup> No comment letters were received. For the reasons discussed below, the Commission is approving the proposed rule change.

#### I. Description

The proposed rule change will eliminate and amend certain of FICC's Government Securities Division ("GSD") and Mortgage-Backed Securities Division ("MBSD") rules that are inconsistent with current practice.

1. Remove the term "Clearing Agent Bank Member" and corresponding references to it in GSD's rules.

This category of GSD membership no longer has any practical meaning and is not used. Entities that are clearing agent banks that wish to join the netting service would become bank netting members.<sup>3</sup>

2. Amend GSD's Rules to remove outdated eligibility qualifications for comparison-only members.

Prior to this rule change, GSD's rules provided for the following types of entities to be eligible to become a comparison-only member: (i) A registered government securities broker or dealer, (ii) a clearing agent bank, or (iii), if neither (i) nor (ii), an entity that has demonstrated to FICC that its business and capabilities are such that it could reasonably expect material benefit from direct access to FICC's services.<sup>4</sup>

FICC believes that GSD's comparison system provides a riskless service whose use should be advantageous to any entity regardless that is an active market participant regardless of the entity's legal or regulatory structure. Accordingly, FICC believes that a better approach to the eligibility criteria for comparison-only entities which would also be consistent with the way that FICC's management views the purpose of comparison-only membership, would be to replace (i) and (ii) with the requirement that a comparison-only applicant be a legal entity that is eligible to apply to be a GSD netting member. FICC would maintain the current (iii) renumbered as (ii).

3. Clarify GSD's rule on voluntary termination of membership.

The proposed change will modify the language in GSD Rule 2, Section 11, to provide that: (i) a member must provide 10 days written notice of terminating its membership but GSD can accept such notice of termination within a shorter period, (ii) the requested termination of

membership would not be effective until accepted by GSD, and (iii) GSD's acceptance would be evidenced by a notice to all members announcing the termination date of such member. Paragraphs (ii) and (iii) are new.

4. Add a provision to GSD's Rules to permit it to have access to the books and records of members.

Prior to this rule change, GSD's rules permitted GSD to access an applicant's books and records but not a member's books and records. Extending GSD's authority to review member's books and records is consistent with other clearing agencies' rules such as those of the National Securities Clearing Corporation.<sup>5</sup>

5. Add a provision to MBSD's Rules to provide for the confidential treatment of documents submitted by applicants as part of the application process.

This rule change will provide appropriate comfort to applicants and will make MBSD's rules consistent with GSD's rules.<sup>6</sup>

6. Add a new provision to MBSD's Rules that provides that at the request of FICC a non-domestic participant must provide an update of the legal opinion submitted by the foreign member or a written status report on FICC's rights under the relevant non-domestic law and add a similar new provision to GSD Rules.<sup>7</sup>

FICC believes that the old language of this MBSD rule is ambiguous and potentially burdensome for members. FICC believes that a better approach would be to provide that if FICC is alerted to a change in circumstances or to an issue of law that brings into question the reliability of the legal opinion previously submitted by a non-domestic participant, FICC will have the right to require the participant to revisit its legal opinion and to provide an update as to the status of FICC's rights under the relevant non-domestic law. FICC will add this provision to GSD's Rules as well.

#### II. Discussion

Section 17A(b)(3)(F) of the Act<sup>8</sup> requires that the rules of a clearing agency be designed to assure the safeguarding of securities and funds in its custody or control or for which it is responsible. The Commission finds that the proposed rule change is consistent with FICC's obligations under Section 17A(b)(3)(F) because clarifying FICC's

<sup>5</sup> New Section 13 of GSD Rule 2.

<sup>6</sup> New Section 11 of MBSD Rules, Article III, Rule 1.

<sup>7</sup> New language to subsection (g) of GSD Rule 2, Section 3; proposed new subsection (iii) of MBSD Article III, Rule 1, Section 14.

<sup>8</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>2</sup> Securities Exchange Act Release No. 49421 (Mar. 16, 2004), 69 FR 13604.

<sup>3</sup> GSD Rule 1.

<sup>4</sup> GSD Rule 2, Section 1.

<sup>7</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).