

negotiations and unilateral decisions regarding spreads).

Because FINRA adopted IM-2110-5 to fulfill part of its 1996 settlement agreement with the SEC, the proposed rule change would transfer IM-2110-5 into the Consolidated FINRA Rulebook as FINRA Rule 5240. Although FINRA is not proposing material changes to the rule, one of the minor changes FINRA is proposing is to add the phrase "or other person" to paragraphs (a)(1) and (a)(3) of the rule to clarify that coordination with or intimidation of a non-FINRA member would be covered by the rule.

FINRA will announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 90 days following Commission approval.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>11</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. In addition, FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(11) of the Act,<sup>12</sup> which requires, among other things, that FINRA rules must be designed to produce fair and informative quotations, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting, distributing, and publishing quotations. FINRA believes that the rule properly emphasizes certain types of misconduct that can impair the fair and orderly functioning of the market and thus serves as an important provision to help ensure the integrity of information placed into the market. The rule being adopted as part of the Consolidated FINRA Rulebook previously has been found to meet the statutory requirements, and FINRA believes the rule has since proven effective in achieving the statutory mandates.

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

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

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

Written comments were neither solicited nor received.

### **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 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. 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-FINRA-2008-061 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090. All submissions should refer to File Number SR-FINRA-2008-061. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. 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-FINRA-2008-061 and should be submitted on or before January 20, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

**Florence E. Harmon,**  
*Acting Secretary.*

[FR Doc. E8-30790 Filed 12-24-08; 8:45 am]

**BILLING CODE 8011-01-P**

## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-59111; File No. SR-FICC-2007-04]

### **Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Approving a Proposed Rule Change Relating to Applicant and Member Disqualification Criteria**

December 17, 2008.

#### **I. Introduction**

On April 30, 2007, 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> On February 7, 2008, and March 19, 2008, FICC amended the proposed rule change. On July 9, 2008, the Commission published notice of the proposed rule change to solicit comments from interested persons.<sup>2</sup> The Commission received two comment letters in response to the proposed rule change.<sup>3</sup> For the reasons discussed

<sup>13</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> Securities Exchange Act Release No. 58128, 73 FR 40893 (July 16, 2008).

<sup>3</sup> Letters from Susanne Trimboth, Ph.D., STP Advisory Services, LLC (Aug. 27, 2008) and Nikki M. Poulos, Managing Director, General Counsel, FICC (Nov. 7, 2008).

<sup>11</sup> 15 U.S.C. 78o-3(b)(6).

<sup>12</sup> 15 U.S.C. 78o-3(b)(11).

below, the Commission is approving the proposed rule change, as amended.

## II. Description

The proposed rule change will amend FICC's Government Securities Division's ("GSD") and Mortgage Backed Securities Division's ("MBSD") (collectively, "Divisions") rules concerning applicant and member disqualification criteria by making the Divisions' rules consistent with the rules of FICC's affiliated clearing agencies, the National Securities Clearing Corporation ("NSCC") and The Depository Trust Company ("DTC"). The proposed rule changes cover the following areas:

### 1. Management Consideration of Disqualification Criteria<sup>4</sup>

Prior to this rule change, GSD's membership qualification rules required FICC's Board of Directors to determine whether the presence of certain negative factors affecting a membership application should constitute the basis for denying membership to such applicant. Information that might have disqualified an applicant (referred to in GSD's rules as "disqualification criteria") include the applicant being subject to a statutory disqualification<sup>5</sup> or conviction of various crimes such as bribery. The disqualification criteria in GSD's rules similarly apply as standards for continued membership.

Under the rule change, FICC will amend GSD's disqualification criteria to allow FICC's management, instead of FICC's Board, to determine whether the presence of a potential disqualifier should prevent an entity from obtaining or continuing membership in GSD. Such change would conform to the rules of MBSD, DTC, and NSCC, which allow such determinations to be made by management.

### 2. Associated and Affiliated Persons

GSD's and MBSD's rules also apply certain applicant and member disqualification criteria to persons "associated" (in GSD's rules) or "affiliated" (in MBSD's rules) with the applicant or member firm. FICC states that it is not always practical for it to ascertain which individuals are "associated" or "affiliated" with a particular entity and therefore proposes to amend these rules to conform them to its internal surveillance procedures and make them consistent across both Divisions. Accordingly, references to persons "associated" or "affiliated"

with the member or applicant are being changed to references to "controlling management," which include those officers of the applicant or member that are currently screened by FICC's Risk Management department pursuant to internal procedures.<sup>6</sup> In addition, FICC will add language to its rules to require applicants to inform FICC as to any member of its controlling management that is or becomes subject to statutory disqualification.

### 3. Monitoring of Objective Disqualification Criteria

GSD's disqualification criteria is being amended to reflect an approach that such criteria should be objectively and practically monitored. Specifically, FICC will delete one disqualification criterion that refers to an applicant being subject to "closer than normal" surveillance by a regulatory body. FICC states that this event might not be reported in a regulatory background check.

In addition, prior to this rule change, MBSD's rules contained only two criteria that could be the basis for denial of a membership application. These were: (i) An applicant's subjection to a statutory disqualification or similar order by another examining authority and (ii) an applicant or an associated person of the applicant making a misstatement of a material fact in connection with its membership application or thereafter. Under this rule change, MBSD will add GSD's remaining disqualification criteria relating to unlawful acts by the applicant's or member's Controlling Management or the applicant's or member's suspension or expulsion from a self-regulatory organization. These additions to MBSD's rules will result in both Divisions having identical disqualification criteria.

Finally, FICC will add a provision to both Divisions' rules that clarifies FICC's right to deny membership to an applicant or member if FICC learns of any factor or circumstance that might impact the suitability of that particular applicant or member as a participant.

### 4. Additional Changes

FICC will make the following changes to provide additional uniformity among the rules of the Divisions, NSCC, and DTC:

(i) Adding to both Divisions' disqualification criteria violations of the Investment Company Act and

Investment Advisers Act,<sup>7</sup> since those statutes apply to their current membership base.

(ii) Amending GSD's definition of "self-regulatory organization" to include those entities that are foreign equivalents. The same definition for "self-regulatory organization" would be added to MBSD's rules.

(iii) Removing the word "willful" from both Divisions' disqualification criteria concerning an applicant's or an applicant's controlling management's violation of the specified federal statutes or any rule or regulation promulgated thereunder. FICC believes that a violation of these provisions, whether or not willful, should be considered as a potential disqualification criterion.

(iv) Deleting references in GSD's rules to Section 153 of Chapters 25 and 47 of Title 18 of the United States Code ("Code") because the crimes covered by these statutes (i.e., embezzlement, forgery, false statements, etc.) are captured by the current disqualification criteria. References to those portions of the Code that deal with mail and wire fraud (Sections 1341, 1342 and 1343) would remain. This provision will also be added to MBSD's rules.

Changes are being made to the cease to act provisions of GSD's rules (Rule 21, "Restrictions on Access to Services") in order to ensure consistency within the rules and across the Divisions.

## III. Comment Letters<sup>8</sup>

Susanne Trimboth, PhD., of STP Advisory Services, LLC, suggested that FICC should also consider an entity's ability to deliver securities for settlement when determining an applicant's or member's suitability as a participant. Ms. Trimboth pointed out that this recommendation is consistent with the Section 17A(a)(5)(C) of the Act<sup>9</sup> and claimed that the cost of FICC members failing to deliver securities at settlement is significant and harms fellow FICC members and investors.

Nikki Poulos, FICC's General Counsel, responded to Ms. Trimboth's comment. While Ms. Poulos acknowledged securities transactions fails as a serious issue for the securities industry, she argued that FICC has attempted to reduce the risks posed by fails.<sup>10</sup>

<sup>7</sup> 15 U.S.C. 80a-1 *et seq.* and 15 U.S.C. 80b-1 *et seq.*, respectively.

<sup>8</sup> See *supra* note 3.

<sup>9</sup> 15 U.S.C. 78q-1(a)(c)(5) ("A registered clearing agency may summarily suspend and close the accounts of a participant who \* \* \* is in default of any delivery of funds or securities to the clearing agency.").

<sup>10</sup> See, e.g., Securities Exchange Act Release Nos. 52157 (July 28, 2005), 70 FR 44959 (Aug. 4, 2005)

<sup>4</sup> GSD Rule 2A, Section 3(d).

<sup>5</sup> The definition of "statutory disqualification" is found at 15 U.S.C. 78c(a)(39).

<sup>6</sup> New GSD Rule 1 and MBSD Article I ("The term 'controlling management' shall mean the Chief Executive Officer, the Chief Financial Officer, and the Chief Operations Officer, or their equivalents, of an applicant of Participant.").

Moreover, Ms. Poulos believes that including a participant's fails as a criterion by which FICC would have to assess participation "would only create more risks in that these open obligations would be processed (or not) outside of FICC, without the benefit of, i.e., re-netting."

#### IV. Discussion

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in its custody or control or for which it is responsible.<sup>11</sup> The proposed rule change should enhance FICC's surveillance and assessment of applicants' and members' regulatory conditions. In addition, the proposed rule change will harmonize both of FICC's division's application and membership requirements and will make clear to all applicants and members of the breadth of information that FICC will require and review in order to develop an accurate risk profile to evaluate an applicant's or member's condition. Accordingly, the proposed rule should strengthen FICC's ability to mitigate financial risk to itself and to its members and therefore should enhanced FICC's ability to assure the safeguarding of securities and funds that are in its custody or control or for which it is responsible.

The Commission also agrees that the issue of "fails" is a serious one for the securities industry. The Commission will continue to monitor developments in this area and will use its regulatory authority if needed to better ensure that appropriate safeguards are in place to facilitate the prompt and accurate clearance and settlement of securities transactions and to protect investors. In this regard, the Commission expects FICC, as a self-regulatory organization and registered clearing agency, to similarly continue to scrutinize its participants' effectiveness in delivering funds and securities in fulfillment of their obligations when using FICC's clearing facilities.

#### V. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in

[FICC-2005-11] (establishing a daily fail netting process basis allowing participants to net outstanding fail obligations with current settlement activity in order to reduce risk exposure among FICC participants) and 54487 (Sept. 22, 2006), 71 FR 58025 (Oct. 2, 2006) [FICC-2005-17] (FICC assumes certain fails of blind brokered repurchase transactions at GSD and obtains financing as necessary in connection with such assumptions).

<sup>11</sup> 15 U.S.C. 78q-1(b)(3)(F).

particular Section 17A<sup>12</sup> of the Act and the rules and regulations thereunder.<sup>13</sup>

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>14</sup> that the proposed rule change (File No. SR-FICC-2007-04), as amended, be and hereby is approved. For the Commission by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8-30786 Filed 12-24-08; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59105; File No. SR-NSCC-2008-08]

### Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing of Proposed Rule Change to Amend Rules to Add an Agreement from Fund Members that Submit Mutual Fund Profile Information

December 16, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on September 30, 2008, National Securities Clearing Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission") proposed rule change File No. SR-NSCC-2008-08. The Commission is publishing this notice to solicit comments from interested parties on the proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by the NSCC.<sup>2</sup>

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

NSCC is proposing to amend its rules to add an agreement that requires NSCC fund members to have taken reasonable steps to validate the accuracy of the data they submit to the Mutual Fund Profile Service database.

<sup>12</sup> 15 U.S.C. 78q-1.

<sup>13</sup> 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).

<sup>14</sup> 15 U.S.C. 78s(b)(2).

<sup>15</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> The exact text of the NSCC's proposed rule change can be found at [http://www.dtcc.com/downloads/legal/rule\\_filings/2008/nsc/2008-08.pdf](http://www.dtcc.com/downloads/legal/rule_filings/2008/nsc/2008-08.pdf).

#### 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 NSCC 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. NSCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.<sup>3</sup>

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

###### 1. Purpose

The Mutual Fund Profile Service ("Profile") is a central data source for comprehensive fund prospectus and operational information relating to mutual funds. The repository is a recognized industry standard for information critical to the distribution of mutual funds in the third-party market.

Profile is organized into three databases: (1) Security Issue Database (containing information such as Security ID number, security name, fee structure, investment objectives, breakpoint schedule data, and blue sky eligibility); (2) Participant Database (containing contact information, NSCC processing capabilities and restrictions or requirements); and (3) Distribution Database (containing projected or actual distributions, capital gains and dividend amounts and details, and commission information). NSCC fund members input data regarding their mutual funds into the Security Issue and Participant Profile databases. Profile is then accessed by the NSCC members that are mutual fund distributors.

NSCC has recently enhanced the Security Issue Database in Profile to include new data fields needed by distributors and to re-engineer the structure of the data hierarchy to be easier for fund members to populate their data. Some of the enhancements to the Profile database were initiated in response to a recommendation in the Report ("Report") of The Joint NASD/ Industry Task Force on Breakpoints ("Task Force").<sup>4</sup> NSCC has also adopted

<sup>3</sup> The Commission has modified portions of the text of the summaries prepared by the NSCC.

<sup>4</sup> The Task Force was formed in 2003 by the National Association of Securities Dealers ("NASD", now "FINRA") with the participation of major fund companies, broker-dealers, NSCC, the Securities Industries Association and the