

July 18, 2024

Submitted Electronically

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: SEC “Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Partial Amendment No. 1, To Modify the GSD Rules To Facilitate Access to Clearance and Settlement of All Eligible Secondary Market Transactions in U.S. Treasury Securities” [Release No. 34-100399; File No. SR-FICC-2024-005]; and “Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Modify the GSD Rules (i) Regarding the Separate Calculation, Collection and Holding of Margin for Proprietary Transactions and That for Indirect Participant Transactions, and (ii) To Address the Conditions of Note H to Rule 15c3-3a” [Release No. 34-100401; File No. SR-FICC-2024-007]

Dear Ms. Countryman:

The International Swaps and Derivatives Association, Inc. (“**ISDA**”)¹ respectfully submits this comment letter to the Securities and Exchange Commission (the “**Commission**” or the “**SEC**”) in response to the SEC’s June 27, 2024² requests for additional comments on the Fixed Income Clearing Corporation’s (“**FICC**”) recently published proposed rule changes. This comment letter

¹ Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 1,000 member institutions from 77 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on ISDA’s website: www.isda.org. Follow us on [Twitter](#), [LinkedIn](#), [Facebook](#) and [YouTube](#).

² *FICC Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Modify the GSD Rules To Facilitate Access to Clearance and Settlement of All Eligible Secondary Market Transactions in U.S. Treasury Securities*, 89 Fed. Reg. 53681 (June 27, 2024); *FICC Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Modify the GSD Rules (i) Regarding the Separate Calculation, Collection and Holding of Margin for Proprietary Transactions and That for Indirect Participant Transactions, and (ii) To Address the Conditions of Note H to Rule 15c3-3a*, 89 Fed. Reg. 53690 (June 27, 2024).

will re-address the points that ISDA made in its April 17, 2024 comment letter to the SEC³ in respect of (1) FICC’s proposed rule change published by the SEC on March 27, 2024 to modify its Government Securities Division Rulebook (“**GSD Rules**” or “**FICC Rules**”)⁴ to facilitate access to clearance and settlement services of all eligible secondary market trades in U.S. Treasury securities in accordance with the Securities Exchange Act of 1934 (“**Exchange Act**”) (the “**Access Proposal**”);⁵ and (2) FICC’s advance notice to amend its GSD Rules and proposed rule change published by the SEC on March 28, 2024 regarding separate and independent calculation, collection, and holding of margin supporting Proprietary Transactions by a FICC Netting Member or that a Netting Member submits on behalf of indirect participants (the “**Segregation Proposal**”,⁶ and together with Access Proposal, the “**FICC Proposals**”).⁷

Terms used but not defined have the meaning provided in the FICC Rules or in the FICC Proposals.

I. The Commission has asked whether the Access Proposal is consistent with Rule 17ad-22(e)(18)(iv)(C), i.e., whether it is reasonably designed to ensure that FICC has appropriate means to facilitate access to clearance and settlement services of all eligible secondary market transactions.

While ISDA appreciates FICC’s efforts to clarify and educate industry participants regarding its access models, FICC has not met its burden to ensure that it has appropriate means to facilitate access to clearance and settlement services of all eligible secondary market transactions. At minimum, ISDA requests that FICC provide significantly more information regarding the rationale for and the use cases and benefits of each clearing model. A clearer understanding of FICC’s objectives with respect to each proposed clearing model is necessary to better appreciate whether the FICC Proposals are in fact “reasonably designed” to facilitate access consistent with Rule 17ad-22(e)(18)(iv)(C) under the Exchange Act.

This information is necessary for FICC participants (both direct and indirect) and the Commission to evaluate and provide feedback regarding whether FICC is meeting its obligations under the Exchange Act. Additionally, this will inform market participants’ selection of the most appropriate

³ ISDA submitted its comment letter in response to the initial publication of the Access Proposal and Segregation Proposal in the Federal Register. See Katherine Darras, ISDA Comment Letter on FICC Rules (Apr. 17, 2024), <https://www.sec.gov/comments/sr-ficc-2024-005/srficc2024005-459631-1194255.pdf> [hereinafter ISDA’s Comment Letter].

⁴ FIXED INCOME CLEARING CORP., FIXED INCOME CLEARING CORPORATION GOVERNMENT SECURITIES DIVISION RULEBOOK (Dec. 4, 2023), https://www.dtcc.com/~media/Files/Downloads/legal/rules/ficc_gov_rules.pdf.

⁵ FICC Notice of Filing of Proposed Rule Change to Modify the GSD Rules to Facilitate Access to Clearance and Settlement Services of All Eligible Secondary Market Transactions in U.S. Treasury Securities, 89 Fed. Reg. 21,362 (Mar. 27, 2024).

⁶ FICC Notice of Filing and Extension of Review Period of Advance Notice To Modify the GSD Rules (i) Regarding the Separate Calculation, Collection and Holding of Margin for Proprietary Transactions and That for Indirect Participant Transactions, and (ii) to Address the Conditions of Note H to Rule 15c3-3a, 89 Fed. Reg. 21,586 (Mar. 28, 2024).

⁷ These FICC Proposals arise out of operationalizing and implementing the SEC’s Treasury clearing rules. See Standards for Covered Clearing Agencies for U.S. Treasury Securities and Application of the Broker-Dealer Customer Protection Rule with Respect to U.S. Treasury Securities, Exchange Act Release No. 99149 (Dec. 13, 2023), 89 Fed. Reg. 2,714 (Jan. 16, 2024) [hereinafter Treasury Clearing Rules].

access model for their businesses and impact ISDA’s analysis on whether additional changes to particular clearing models are necessary and what those changes should entail. For example, while FICC proposes to rebrand its existing Prime Broker and Correspondent Clearing models into its new Agent Clearing Model, given that there is no meaningful repo activity taking place through these models today, there is no reason to believe that FICC’s proposed changes are sufficient to facilitate the Commission’s mandate. For these reasons, ISDA again requests that FICC take additional steps to articulate and outline what might motivate a market participant’s selection of one model over another.

In addition, ISDA asks FICC to holistically review its rulebook to avoid any anticompetitive implications. Currently, the proposed FICC Rules mandate that Netting Members submit all Eligible Secondary Market Transactions to FICC for clearing without exception. Other FICC Rules are similarly anticompetitive (e.g., Section 7(e) of FICC Rule 2A).⁸ Section 17A of the Securities Exchange Act prohibits a clearing agency from having rules that impose “any burden on competition not necessary or appropriate in furtherance of the purposes of the [Act].”⁹ While there are currently no other clearing agencies registered with the SEC, both ICE Clear Credit LLC and CME Group Inc. have announced their desire to provide clearing services in the near future.¹⁰ ISDA encourages FICC to review the FICC Rules and make the necessary changes to comply with the Exchange Act.

II. The Commission has asked whether the Access Proposal should be revised to include additional requirements for the proposed change to meet Rule 17ad-22(e)(18)(iv)(C)’s requirement that the proposed rule facilitate access to clearance and settlement of all eligible secondary market transaction of all eligible secondary market transactions, e.g., in terms of additional requirements, what commenters’ views are on whether FICC needs to include a porting mechanism.

ISDA maintains that the FICC Rules should explicitly provide for a porting mechanism for use in the ordinary course that allows a client to transfer its term trade positions¹¹ to another Netting Member. As further detailed in ISDA’s Comment Letter,¹² a porting mechanism for term trades is desirable for several reasons. Foremost, if there is ever an issue with a Clearing Member (short of a bankruptcy), the client would want the ability to port term trade positions away from that member to a different clearing member. Further, ISDA members have already come to rely on this type of guardrail in the futures clearing model as an essential risk management tool. For these reasons,

⁸ See FIXED INCOME CLEARING CORP., *supra* note 2 at 86.

⁹ 15 U.S.C. § 78q-1(b)(3)(I).

¹⁰ See, e.g., ICE Moves to Clear U.S. Treasuries as Market Regulation Expands (June 24, 2024) available at <https://www.bloomberg.com/news/articles/2024-06-24/ice-moves-to-clear-us-treasuries-as-market-regulation-expands>; CME Group Bids to Enter US Treasuries Clearing Business (Mar. 12, 2024) available at <https://www.reuters.com/markets/us/cme-group-bids-enter-us-treasuries-clearing-business-financial-times-reports-2024-03-12/>.

¹¹ Porting would not be useful for overnight trades since those are short-lived and would roll off before the porting could occur.

¹² See ISDA’s Comment Letter at 5.

ISDA requests that FICC introduce a porting mechanism now and not wait until after implementation of the FICC Proposals to do so.

III. With respect to the Access Proposal, the Commission has asked what commenters' views are on whether changes to particular clearing models at FICC are necessary for the rules to facilitate access to clearance and settlement services and which clearing model(s) (i.e., Sponsored or Agent Clearing Programs), and which margin configuration(s), (i.e., segregated and/or net), are the most appropriate place to make such requirements.

The FICC Proposals should be updated so that the Agent Clearing Service Rules contain trade liquidation procedures. The FICC Rules currently have liquidation procedures for done-with sponsored trades which may be used upon an event of default or other similar triggering condition in respect of the Sponsored Member who entered into those trades. Addressed in greater detail in ISDA's Comment Letter,¹³ an Executing Firm Customer similarly can experience events of default or other similar triggering conditions that warrant the closure of its positions by its Agent Clearing Member. As such, it is unclear why the FICC Proposals only provide for this remedy under the Sponsored Service for done-with trades.¹⁴ Additionally, ISDA remains unaware of any regulatory reason for this inconsistency.

ISDA believes that the FICC Proposals should provide that an Agent Clearing Member may liquidate an Executing Firm Customer's positions by transferring the positions to its proprietary/house account or by transferring positions into the Agent Clearing Member Omnibus Account to flatten open positions of the Executing Firm Customer. If the trade is done-with the Agent Clearing Member, it should be made clear that the associated trade done in the Agent Clearing Member's house account which corresponds to the Executing Firm Customer's position should not have to be closed out. The failure to provide a necessary safety tool such as this will require an Agent Clearing Member to keep positions open at FICC for the positions' entire duration upon a default of its Executing Firm Customer, even if those positions are term trades – increasing exposure to both the Agent Clearing Member and FICC alike, including in the Executing Firm Customer's bankruptcy.

ISDA further recommends that similar trade liquidation procedures to what is described above for the Agent Clearing Service be set out in the FICC Rules for done-away sponsored trades in the Sponsored Service. ISDA understands that the legal analysis regarding closing out positions is more complex for "done-away" as opposed to "done-with" trades,¹⁵ and continues to offer FICC its support in ensuring that any close-out provision or right to terminate added to the FICC Proposals covering done-away trades is evaluated under all relevant jurisdictions. In the meantime, however, ISDA urges FICC to include a liquidation provision covering trading under the Agent Clearing Service and done-away trading under the Sponsored Service now rather than

¹³ See ISDA's Comment Letter at 2-3.

¹⁴ See FIXED INCOME CLEARING CORP., *supra* note 4.

¹⁵ See ISDA's Comment Letter at 3; This is also provided in response to the Commission's request for comment with respect to how the proposed rule change addresses "done-with" and "done-away" transactions of indirect participants and its consistency with Rule 17ad-22(e)(18)(iv)(c).

implementing it later, potentially putting Clearing Members at risk during the period of its absence. Accordingly, the FICC Proposals should be revised to provide that a Clearing Member may transfer and liquidate an Executing Firm Customer's positions or Sponsored Member's done-away positions.¹⁶

In addition, ISDA reiterates its request for FICC to confirm whether branches of a bank or a Netting Member's affiliates can access FICC by the bank's or Netting Member's Direct Membership.¹⁷ The Access Proposal does not address whether a U.S. Treasury securities repo (as defined below) entered by a bank branch or an affiliate of a Direct Participant of FICC may be cleared in the Direct Participant's account at FICC, such that they would not have to establish indirect access to FICC. FICC's insight on this point impacts ISDA's analysis regarding with respect to changes that must be made to the proposed models. As such, ISDA respectfully requests that FICC confirm that in this instance, the bank's branches and Netting Member's affiliates can establish a separate Margin Portfolio within the Direct Participant's account that would be separately netted and margined, such that they would not have to establish indirect access to FICC.

Finally, as more fully discussed in the ISDA Comment Letter,¹⁸ FICC's indemnification requirement for legal entity identifiers ("LEIs") must be more nuanced. As drafted, the rule is overreaching and impracticable, and could result in clearing inefficiencies. First, LEIs must be renewed on an annual basis and in some instances, this process gets delayed. Delays in the renewal process may result in an LEI lapsing for a period before it is ultimately renewed. A person's trading activity should not be halted by virtue of this sort of lapse. Next, ISDA is unaware of any other regulatory mandates requiring LEIs for U.S. Treasury securities cash and repurchase or reverse repurchase (collectively, "repo") trades. Further, it remains unclear why FICC needs this indemnification, particularly where other information identifying Executing Firm Customers will be submitted with each trade. As previously suggested, ISDA believes that the indemnification should be narrowly tailored to cover losses, liabilities, and expenses arising out of Legal Action stemming from an Agent Clearing Member's failure to have the current LEIs of its Executing Firm Customers on file with FICC where such failure is the result of the Agent Clearing Member's gross negligence, willful misconduct or fraudulent conduct. ISDA once again asks FICC to reconsider the proposed indemnification provision and tailor it more appropriately.

IV. The Commission has asked if the Segregation Proposal is consistent with Rule 17ad-22(e)(4)(i) under the Exchange Act, which requires that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes by maintaining sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence.

¹⁶ See ISDA's Comment Letter at 2-3.

¹⁷ For a more detailed discussion of this point, please see the ISDA's Comment Letter at 6-7.

¹⁸ See ISDA's Comment Letter at 5-6.

The FICC Proposals should clarify that funds-only settlement amounts are not required to be subject to segregation. ISDA members seek this assurance from FICC so that its members can accurately gauge their obligations consistent with Rule 17ad-22(e)(4)(i) under the Exchange Act and ensure their compliance with FICC’s applicable segregation rules. ISDA recognizes that the FICC Proposals seemingly do not treat funds-only settlement amounts as subject to segregation;¹⁹ however, the absence of an explicit carve-out is concerning and so ISDA seeks FICC’s further clarification. Accordingly, ISDA again asks FICC to clarify that funds-only settlement payments are not subject to segregation requirements.

In addition, ISDA’s Comment Letter also requested that FICC provide additional support for its unreasonably high \$1 million cash minimum clearing fund deposit requirement²⁰ for segregated initial margin and instead establish a minimum account based on a client’s individual risk profile. FICC’s rationale (that this is similar to what is done in an unrelated context and that FICC is restricted from using the funds for loss mutualization) is not well considered, particularly in light of Rule 17ad-22(e)(4) under the Exchange Act requiring FICC to, *inter alia*, measure its credit exposures. ISDA is particularly concerned that the \$1 million cash threshold will make it difficult for smaller firms to select the segregation model. Accordingly, ISDA continues to urge FICC to reconsider this minimum amount and establish a minimum amount more commensurate with a client’s actual risk profile. This is consistent not only with the goal of providing a broad, liquid and dynamic market for those that are required to clear their U.S. Treasury securities trades but also with the goal of promoting accessibility to the U.S. Treasury securities market.

V. The Commission has asked if the Segregation Proposal is consistent with Rule 17ad-22(e)(23)(ii) under the Exchange Act, which requires that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide sufficient information to enable participants to identify and evaluate the risks, fees, and other material costs they incur by participating in the covered clearing agency.

FICC should confirm that activity of Netting Members for indirect participants, including the activity for those who post margin in Segregated Indirect Participant Accounts, does not magnify risk on Netting Members. ISDA is not certain that the additional Required Fund Deposits allowed under FICC’s new Margin Component Schedule take into consideration and sufficiently cover the enhanced risk from these indirect obligations of Netting Members. ISDA members also seek clarity from FICC regarding the allocation of its Clearing Fund, which in FICC’s case encompasses a default fund component, to cover risks being brought into the system by indirect participants.

¹⁹ See Segregation Proposal, *supra* note 6 (funds-only settlement amounts are missing from proposed Rule 4’s description of the calculation and collection of segregated margin).

²⁰ See Segregation Proposal, *supra* note 6 at 21,595 (“FICC is proposing to require that the Segregated Margin Requirement be no lower than \$1 million per Segregated Indirect Participant, and that the same form of deposit requirements set forth in Rule 4, Section 3 apply to Segregated Customer Margin such that no less than \$1 million per Segregated Indirect Participant consist of cash.”).

VI. Conclusion

We appreciate the opportunity to submit additional comments in response to the SEC's request for further comments on the FICC Proposals. ISDA members are strongly committed to maintaining the safety and efficiency of the U.S. financial markets and ensuring the efficiency of robust and functional derivatives markets. While ISDA supports FICC's efforts to create the access and segregation framework to fulfill the Treasury Clearing Rules' mandate for the clearing of certain cash and all repo secondary market trades in U.S. Treasury securities, we maintain that the current FICC Proposals require the adjustments and clarifications set out in this letter.

We look forward to further engagement with FICC and the Commission on these important issues. Please do not hesitate to contact Ann Battle, Senior Counsel (abattle@isda.org) or Nikki Cone, Associate General Counsel (ncone@isda.org) should you have any questions.

Sincerely,



Katherine Darras
General Counsel
International Swaps and Derivatives Association (ISDA)