



August 6, 2024

Submitted Electronically

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

Re: FIA Comments on SEC “Notice of Filing of Proposed Rule Change To Modify the GSD Rules Relating to the Adoption of a Trade Submission Requirement” [Release No. 34-100417; File No. SR-FICC-2024-009]

Dear Ms. Countryman:

The Futures Industry Association (“**FIA**”)¹ welcomes the opportunity to submit this letter in response to the U.S. Securities and Exchange Commission’s (“**SEC**” or the “**Commission**”) request for comment on proposed rule changes by the Fixed Income Clearing Corporation (“**FICC**”) to modify FICC’s Government Securities Division (“**GSD**”) Rulebook (“**Rules**”) to incorporate the trade submission requirement (the “**Proposal**”).² FIA is providing comments on the Proposal in order that the Rules may work more effectively in practice for both FICC and its Netting Members. We respectfully request the Commission and FICC to consider our comments and make the recommended improvements to the Proposal.³

¹ FIA is the leading global trade organization for the futures, options, and centrally cleared derivatives markets, with offices in London, Brussels, Singapore and Washington DC. FIA’s mission is to support open, transparent and competitive markets; protect and enhance the integrity of the financial system; and promote high standards of professional conduct. FIA’s membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries, as well as technology vendors, lawyers and other professionals serving the industry. FIA’s core constituency consists of firms that operate as clearing members in global derivatives markets, including firms registered with the Commodity Futures Trading Commission (“**CFTC**”) as futures commission merchants, the majority of which are also registered with the SEC as broker-dealers.

² FICC Notice of Filing of Proposed Rule Change to Modify the GSD Rules Relating to the Adoption of a Trade Submission, 89 Fed. Reg. 54,602 (Jul. 1, 2024) [hereinafter cited to as “**Proposal**”].

³ Terms used but not defined herein have the meaning provided in the Rules or in the Proposal.

I. Executive Summary

FIA's chief goals in providing comments on the Proposal are to improve and streamline FICC's monitoring of the trade submission requirement. We also believe that the Commission and FICC may need to provide relief from compliance with the trade submission requirement to allow the industry enough time to solve issues involving non-U.S. counterparties. Please consider these requests, which are described in more detail in our letter:

- As drafted, Rule 5 of the Proposal does not permit Netting Members to clear Treasury securities through any other clearing agency. The Proposal expressly contradicts the requirements in Section 17A of the Securities Exchange Act of 1934, as amended (the “**Exchange Act**”) and will become unworkable for Netting Members that become members of other clearing agencies as they may arise. FICC should revise Rule 5 to allow Netting Members to clear U.S. Treasury securities through other clearing agencies.
- The Proposal's compliance framework needs to be streamlined to be more practical for Netting Members. This could be done in a way that enables FICC to comply with its oversight obligations more effectively and provides more flexibility to Netting Members. FICC should make the following enhancements to its compliance framework:
 - Revise the ad hoc notification of a trade submission failure to (1) expand the scope of permissible contact persons and (2) include a materiality standard;
 - Modify the annual compliance attestation requirement to (1) broaden the scope of the signatory and (2) revise the content of the attestation to focus on having policies and procedures that have been reasonably designed to prevent material violations of the trade submission requirement and that have been reviewed and updated, as appropriate, to address any material violations; and
 - Eliminate the Triennial Requirement (defined below).
- FICC should clarify that any compliance certification, review, or notification of a failure is limited to a Netting Member's activities and does not extend to the activities of its Sponsored Members, customers, or counterparties. Netting Members will have no way to monitor such entities for compliance and, as such, FICC should make clear that Netting Members are not under any obligation to do so under the Rules.
- FICC's compliance program should be flexibly designed and clearing agency agnostic. Because the SEC's compliance monitoring requirements apply to all clearing agencies that offer U.S. Treasury clearing, Netting Members should be able to leverage their compliance with FICC's program across other clearing agencies. The SEC and FICC should reconsider the costs and benefits associated with FICC's proposed compliance framework now that the framework is available for analysis.

- FICC should clarify which of its new initial membership standards apply to existing Netting Members to avoid confusion or inadvertent non-compliance.
- FICC should toll its penalties while a Netting Member remediates a compliance issue.
- The SEC and FICC may need to provide relief from the trade submission requirement to enable more time for cross-border concerns to be addressed.
- FICC should not make changes to how non-U.S. banks access clearing services and, therefore, should not “clarify language in the Rules to make clear that a bank and its branches must all apply under the same membership, as one Bank Netting Member.”⁴

II. The Proposal Should Be Revised to Remove Any Implication That It Is Anti-Competitive

FICC should revise Rule 5 before adopting the Proposal to avoid any potentially anti-competitive effects with other clearing agencies. Rule 5 implements the trade submission requirement and, as proposed, states: “Netting Members shall submit to the Corporation for Novation all Eligible Secondary Market Transactions, as such term is defined in this Rule, to which such Netting Member is a counterparty.”⁵ As drafted, Rule 5 would not allow Netting Members that are members of other clearing agencies to clear U.S. Treasury securities through these other clearing agencies.

Proposed Rule 5 is inconsistent with Section 17A of the Exchange Act, which directs the Commission to facilitate the establishment of a clearance and settlement system, “having due regard for the public interest, the protection of investors, the safeguarding of securities and funds, and *maintenance of fair competition* among brokers and dealers, clearing agencies, and transfer agents”.⁶ The Exchange Act also prohibits clearing agencies from establishing rules that impose a

⁴ Proposal at 54,605.

⁵ Fixed Income Clearing Corp., Modify the GSD Rules Relating to the Adoption of a Trade Submission Requirement (Form 19-b4), Rule 5 at 128 (June 12, 2024) (available at <https://www.dtcc.com/-/media/Files/Downloads/legal/rule-filings/2024/FICC/SR-FICC-2024-009.pdf>).

⁶ 15 U.S.C. § 78q-1(a)(2) (emphasis added). That section reads in its entirety:

(A) The Commission is directed, therefore, having due regard for the public interest, the protection of investors, the safeguarding of securities and funds, and maintenance of fair competition among brokers and dealers, clearing agencies, and transfer agents, to use its authority under this chapter— (i) to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of transactions in securities (other than exempt securities); and (ii) to facilitate the establishment of linked or coordinated facilities for clearance and settlement of transactions in securities, securities options, contracts of sale for future delivery and options thereon, and commodity options; in accordance with the findings and to carry out the objectives set forth in paragraph (1) of this subsection.

(B) The Commission shall use its authority under this chapter to assure equal regulation under this chapter of registered clearing agencies and registered transfer agents. In carrying out its

“burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act].”⁷ If retained, Rule 5 would not allow for competition among clearing agencies. It would instead stand to stifle competition by requiring all U.S. Treasury securities to be cleared by a single clearing agency. FIA recommends that the Commission review the Proposal in light of its mandate to promote fair competition among clearing agencies.

Although FICC currently is the sole clearing agency that offers U.S. Treasury securities clearing, CME Group Inc. and ICE Clear Credit LLC have publicly announced their intentions to offer this clearing service.⁸ The Commission itself appears to recognize that other clearing agencies may offer U.S. Treasury clearing in the future. The Commission generically refers to “U.S. Treasury security [covered clearing agencies]” and not specifically to FICC in its own rulemaking mandating the clearing of certain U.S. Treasury trades (the “**Treasury Clearing Rules**”).⁹ FICC’s Rules should contemplate and accommodate Netting Members’ clearing through other clearing agencies approved by the SEC for U.S. Treasury securities clearing.

Proposed Rule 5 also may prohibit Netting Members from accessing FICC in other ways, such as through the agency clearing model or as a Sponsored Member of another Netting Member. Under the agency clearing model, a Netting Member may become a customer of another Netting Member. The Netting Member customer would not submit trades directly to FICC for novation; rather, its Netting Member agent would submit such trades to FICC for novation. This scenario may arise where a Netting Member desires to have multiple types of access to FICC, for example, if one type of access is necessary to comply with Commodity Futures Trading Commission segregation requirements. Alternatively, a Netting Member may choose to become a Sponsored Member of another Netting Member. Rule 5 as proposed could bar a Netting Member from accessing FICC in these ways in stating that “Netting Members shall submit to the Corporation for

responsibilities set forth in subparagraph (A)(ii) of this paragraph, the Commission shall coordinate with the Commodity Futures Trading Commission and consult with the Board of Governors of the Federal Reserve System.

⁷ 15 U.S.C. § 78q-1(b)(3)(I).

⁸ Nikou Assari & Jennifer Hughes, *CME Group bids to enter US Treasury clearing business*, THE FINANCIAL TIMES (Mar. 12, 2024), <https://www.ft.com/content/4693d21d-b3dd-43a5-8fec-4b898fc2ac57>; *ICE to Launch Treasury Clearing Service to Increase Transparency and Enhance Resilience in the U.S. Treasury Market*: INTERCONTINENTAL EXCHANGE, INC. (Jun. 24, 2024), <https://ir.theice.com/press/news-details/2024/ICE-to-Launch-Treasury-Clearing-Service-to-Increase-Transparency-and-Enhance-Resilience-in-the-U.S.-Treasury-Market/default.aspx>. ICE Clear Credit already has launched a website dedicated to its U.S. Treasury securities clearing services. INTERCONTINENTAL EXCHANGE, INC., <https://www.ice.com/clear-credit/us-treasury-clearing> (last visited July 16, 2024). In addition, the London Clearing House has expressed interest in entering the U.S. Treasury securities clearing market. See Carolina Mandl & Davide Barbuscia, *LCH looking at clearing US Treasuries, competition set to increase*, REUTERS (Mar. 13, 2024), <https://www.reuters.com/business/london-clearing-house-says-looking-clearing-us-treasuries-2024-03-13/>.

⁹ See generally SECURITIES AND EXCHANGE COMMISSION, 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, 89 Fed. Reg. 2,714 at 2,823 (Jan. 16, 2024).

Novation all Eligible Secondary Market Transactions.” FICC should clarify that these types of access will be available to Netting Members.

From a practical point of view, it is preferable for FICC to revise its Rules now rather than wait until other clearing agencies begin offering U.S. Treasury securities clearing. If FICC waits to revise its Rules until that time, Netting Members will face regulatory uncertainty and implementation delays. Netting Members should be comfortable taking steps to utilize other clearing agencies for U.S. Treasury securities clearing now and in the future. It is therefore imperative that FICC provide clear rules from the start and revise Rule 5 and any other relevant provisions in its Rules now to take account of other possible clearing agencies.

III. FICC’s Compliance Regime Should Be Streamlined for Effectiveness and Flexibility

FICC’s compliance program should be streamlined in a manner that is more effective for FICC to administer and more flexible for Netting Members to execute. We acknowledge that Rule 17ad-22(e)(18)(iv)(B) of the Exchange Act requires that a clearing agency for U.S. Treasury securities “establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, identify and monitor its direct participants’ required submission of transactions for clearing, including, at a minimum, addressing a direct participant’s failure to submit transactions.”¹⁰ And we understand that the Commission noted that a clearing agency could “require attestations from senior officials of direct participants” regarding their compliance with the trade submission requirement.¹¹ We believe an attestation framework could be an effective means for a clearing agency, such as FICC, to carry out its monitoring obligation. However, it must be fit for purpose and appropriately tailored. As explained below, FICC’s proposed compliance program needs streamlining to be more efficient and flexible, without overlapping and onerous reporting requirements and the attendant costs that each obligation imposes on Netting Members.

A. The Specific Trade Submission Failure Notification Requirement Should Be More Flexible

FICC should provide flexibility in the notification requirement of a trade submission failure by permitting appropriate personnel to handle its submission and by limiting notifications to only those issues of non-compliance that are material. Pursuant to Section 2(b) of Proposed Rule 5, a Netting Member must provide FICC with written notification within two Business Days from the date on which it learns that it is no longer in compliance with the trade submission requirement and must identify and provide the contact information of the member of the Netting Member’s Controlling Management overseeing the matter (*i.e.*, the Chief Executive Officer, the Chief Financial Officer, the Chief Operations Officer, and the Chief Risk Officer, or their equivalents, or such other individuals or entities with direct or indirect control over the Netting Member; and,

¹⁰ 17 C.F.R. § 240.17ad-22(e)(18)(iv)(B).

¹¹ See Proposal at 54,606 (and as recommended in the Commission’s adopting release).

for a Registered Investment Company Netting Member, the investment manager that is overseeing the matter).

FIA requests that FICC revise Section 2(b) of Proposed Rule 5 to provide that a Netting Member identify and provide the contact information of either a member of Controlling Management or the person directly responsible for resolving the non-compliance issue. So revised, Rule 5 would allow a Netting Member to select the appropriate contact person depending on the circumstances, including the nature and scope of the issue and whether the issue relates to a systems issue or human error, which may involve different personnel.

In addition, the notification requirement should be limited to issues of non-compliance that are material. Netting Members otherwise could be subject to the reporting requirement for failure to clear a single trade. This type of reporting would be burdensome for Netting Members and FICC alike. Without a materiality requirement, FICC would need to expend resources to distinguish between non-compliance issues that are not systemic or important to market stability from those that may in fact implicate the broader market. FIA urges FICC to include a materiality standard in the notification requirement.

B. The Annual Compliance Attestation Should Likewise Be More Flexible and Complement the Notification Requirement

The annual compliance attestation should be modified to (1) similarly broaden the scope of the person that may be responsible for the attestation; (2) focus on a Netting Member's policies and procedures instead of a representation as to strict compliance with the trade submission requirement; and (3) allow a carveout from the attestation for non-compliance issues previously disclosed under the notification requirement. FIA appreciates that the SEC specifically noted that an attestation program could enable clearing agencies to monitor for compliance with the trade submission requirement,¹² but the proposed program should be revised to be more flexible and complementary of FICC's proposed specific trade submission failure notification requirement.

Netting Members should be permitted to choose the internal person responsible for the attestation. As proposed, Section 2(iii)(c)(1) of Rule 3 would require a Netting Member to submit to FICC an annual trade submission attestation that is signed by a Netting Member's chief compliance officer ("CCO") or most senior authorized officer of the Netting Member who performs a substantially similar function to a CCO.¹³ A Netting Member's CCO may not be the

¹² See *id.* at 2,749.

¹³ Fixed Income Clearing Corp., *supra* n. 5, at 113 (Rule 3, Section 2(iii)(c)(1)). The attestation requirement provides that an attesting officer has read and understands the trade submission requirement set forth in Rule 5, the Netting Member has established, maintains and enforces policies, procedures or other controls that are reasonably designed to ensure ongoing and continued compliance with the trade submission requirement, such controls are reasonably designed to promptly identify and remediate any occurrences of non-compliance with the trade submission requirement, and the Netting Member has, at all times during the 12 months prior to the date of the attestation, complied with the trade submission requirement set forth in Rule 5.

appropriate person to sign the attestation. A Netting Member may have a different CCO for the broker-dealer, futures commission merchant, and swap dealer registrants within the same legal entity. This is particularly true at large, global financial institutions. In this type of institution, each CCO covers different business lines and regulatory mandates. It is unclear under the proposed rule text which of these CCOs is best positioned to sign the attestation. Moreover, a CCO may not be the best-positioned person to sign the attestation because he or she may not have the relevant knowledge to make the attestation. Nor is this problem solved by extending signing authority to a person performing “a substantially similar function to [the] CCO.” For these reasons, a Netting Member should be allowed to provide an attestation signed by either its CCO or the person responsible for clearing matters. FIA requests that FICC broaden the scope of the person who signs the attestation to include a CCO, a person with “substantially similar functions”, or any person with responsibility for U.S. Treasury securities clearing.

FIA is further concerned that the annual attestation does not allow any room for error. This is an unrealistic standard and conflicts with FICC’s other proposed notification requirements. The annual compliance attestation, as proposed, would require a Netting Member to attest that it has, at all times during the 12 months prior to the date of the attestation, complied with the trade submission requirement set forth in Rule 5. A Netting Member may have experienced non-compliance issues during the preceding 12 months, but promptly notified FICC about these issues pursuant to the notification requirement. Further, the annual attestation should be recast to be a confirmation about a Netting Member’s policies and procedures and whether they are reasonably designed to prevent material violations of the trade submission requirement. If a Netting Member has experienced a material violation of the requirement, the Netting Member would need to explain whether it made changes to its policies and procedures to prevent future violations. A standard regarding policies and procedures is consistent with other SEC and regulatory compliance attestations.¹⁴ Such a standard is clearing agency agnostic, too, and therefore could be used across all clearing agencies that provide clearing for U.S. Treasury securities.

C. The Triennial Independent Trade Submission Report and Review Should Be Eliminated or Significantly Revised

FIA urges FICC to eliminate the Triennial Independent Trade Submission Report and Review (the “**Triennial Requirement**”). The Triennial Requirement is redundant with the annual compliance attestation and the ad hoc notification requirement. We therefore do not see how it is necessary to fulfill FICC’s compliance monitoring obligation. The simplest and by far best solution is to eliminate the Triennial Requirement.

¹⁴ See e.g., 17 C.F.R. § 240.15Fh-3 (requiring a security-based swap dealer to have “written policies and procedures addressing the supervision of the types of security-based swap business in which the security-based swap dealer . . . is engaged and the activities of its associated persons that are reasonably designed to prevent violations of applicable federal securities laws and the rules and regulations thereunder . . .”) and 17 C.F.R. § 240.15Fi-5 (requiring a security-based swap dealer to have policies and procedures reasonably designed to comply with security-based swap trading relationship documentation rules).

If the Triennial Requirement is nevertheless retained, it should be significantly revised to be workable for Netting Members. Respectfully, we believe the nature and extent of the necessary changes serve as further evidence that the requirement is misguided and should be removed.

First, FICC would need to eliminate the requirement that it approve third parties that perform the review under the Triennial Requirement and remove the restrictions on using in-house resources. A Netting Member would need the flexibility to use its own reasonable judgment to select a trusted third party to perform the review. FICC's approval of the selection would unnecessarily introduce ambiguity, time delay and costs to the Triennial Requirement. A Netting Member would also need flexibility to use internal resources to perform the triennial review, as it reasonably deems appropriate. It should not be limited to using an internal independent group that reports directly to the Netting Member's board of directors, a committee of that board or to the equivalent senior most governing body. Some Netting Members have internal independent audit or compliance functions that would be ideal for this kind of review, but because these functions do not report to the board or a committee of the board or are located within an affiliate, they would not satisfy FICC's Rules.

Second, FICC would need to allow a Netting Member to submit the Triennial Report to a committee of its board or to the board itself. The Proposal would require that the triennial report be submitted to a Netting Member's board of directors, which may only meet quarterly (or even less frequently). Instead of imposing a rigid obligation to submit the triennial report to the board of directors, FICC would need to allow a Netting Member to submit the report to a committee of the board or the board.

Third, only the person who oversees the report should be required to sign it. It is not necessary that the CCO also sign the report for the reasons discussed above. FICC would need to make changes to the Triennial Requirement to reflect this flexibility.

Fourth, the triennial report's compliance standard would need to be made more pragmatic. The Proposal would require a Netting Member to represent that it has complied with the trade submission requirement "on an ongoing basis during the period covered by the review." It is not clear how a Netting Member could make this representation if it has experienced *any* issue of non-compliance. Further confusing is that the report must describe any issues of non-compliance, which appears on its face to be inconsistent with the afore-mentioned representation of compliance. If the Triennial Requirement remains, FIA urges FICC to take a similar approach for the Triennial Requirement as we have requested for the annual compliance attestation: allow Netting Members to represent that they have policies and procedures that have been reasonably designed to prevent material violations of the trade submission requirement and, if they have experienced a material violation of such requirement, they have made changes to their policies and procedures to prevent future violations, as appropriate.

Finally, FICC would need to clarify the essential elements of the report. Under the Proposal, FICC may determine, in its sole discretion, that a report is "incomplete, inadequate or

otherwise does not meet the requirements of the Rule,” in which case a Netting Member must re-do the review and re-submit the report to FICC, all while incurring a \$15,000 recurring fine. FICC should not have unfettered discretion to order a Netting Member to conduct a report again. There should be clear, objective criteria, established *ex ante*, that FICC should consider in deeming any report incomplete or otherwise inadequate, and thereby subjecting a Netting Member to a fine. Moreover, FICC should allow Netting Members to submit a report early and provide a grace period for Netting Members that have acted in good faith in the preparation of a report FICC finds to be insufficient to re-perform the review and re-submit the report to avoid incurring unnecessary penalties.

To reiterate, we believe the Triennial Requirement is unnecessary and urge FICC to eliminate it from the final version of the rule. If FICC proceeds with the Triennial Requirement, FICC should make the above recommended changes to make the requirement minimally workable.

IV. FICC Must Clarify that Netting Members Are Not Responsible for Third-Party Compliance in Connection with Done-Away Clearing

FICC needs to clarify that any notification, attestation, review, or report required under the Proposal applies solely to a Netting Member’s activities. Under the agency clearing model, where a Netting Member engages in done-away clearing on behalf of its customers, the Netting Member will have no information about its customers’ or executing brokers’ compliance with the trade submission requirement. Similarly, a Netting Member will not know whether its Sponsored Members are in compliance with the trade submission requirement. FIA requests that FICC clarify that Netting Members’ compliance obligations do not cover any representations about their customers’, Sponsored Members’ or any other third party’s compliance with the trade submission requirement.

V. Thorough Cost-Benefit Analysis Is Warranted for The Proposed Compliance Framework

FIA recommends that FICC and the Commission review the Proposal (including its costs) with a broader view of its Netting Members’ existing regulatory obligations. Netting Members’ existing compliance programs are robust and should give FICC comfort that they will monitor and identify issues of non-compliance in the ordinary course. Any special, additional requirements introduced by virtue of the SEC’s Treasury Clearing Rules should be carefully assessed against the current regulatory landscape and where they are found appropriate, narrowly tailored to accomplish the compliance objective without undue burden to market participants.

We believe that an additional cost-benefit analysis is warranted for the new compliance framework. The SEC’s rulemaking procedures require a cost-benefit analysis of new regulations, which the SEC undertook. When the SEC adopted the Treasury Clearing Rules, it remarked that

it had not received comments on the estimated burden of the compliance monitoring requirement.¹⁵ Now that FICC has issued the Proposal, the SEC and FICC should reevaluate the costs and benefits associated with the compliance monitoring requirement, both on FICC and on Netting Members, and the assumptions previously made in that regard.

More specifically, if additional compliance burdens will be imposed on clearing members, they should at a minimum take into account the possibility of other clearing agencies to avoid duplication of compliance oversight. If each clearing agency were to adopt similar compliance requirements to those being imposed by FICC, the costs associated with U.S. Treasury securities clearing will increase. FICC and the Commission should seek to minimize those costs to the extent possible. Netting Members should be able to leverage the reports FICC intends to require across all clearing venues. Accordingly, any final compliance requirements should be flexible, principles-based requirements.

More generally, FIA is concerned that the proposed compliance requirements indicate a move toward product-by-product compliance metrics. Such compliance metrics are inconsistent and redundant with annual CCO reports, which are intended to cover the entirety of a registrant's regulated business activities. New product-by-product requirements are time-consuming and will inevitably take personnel away from daily monitoring and other responsibilities. Any benefits of a compliance framework specific to Treasury securities clearing needs to be weighed carefully against its costs.

VI. FICC's Ongoing Membership Requirements Need to Be Specific and Not Overreaching

The Proposal introduces new requirements for ongoing membership which have the potential to be overreaching. These include the new requirement under Rule 3 that FICC Members submit to FICC information that it may reasonably require from time to time. Additional changes to Rule 3 include providing not only annual audited (or unaudited) financial statements for a Member¹⁶ but also for the Member's affiliates, as FICC requests in its sole discretion. Further, under new Rule 3, Members must provide on an annual basis, and from time to time when FICC deems appropriate, responses to due diligence requests and additional reports or other information.¹⁷ All of these requirements are very broad and general. The proposed changes to Rule 3 raise questions as to whether Netting Members themselves will be responsible for collecting this information from their Sponsored Members, which could be extraordinarily burdensome, particularly given the expected volume of clearing activity. The Proposal further introduces a number of additional requirements for new applicants, but it is uncertain whether these would

¹⁵ See 89 Fed. Reg. at 2,823.

¹⁶ Rule 3 applies to "Members", which currently encompasses a Comparison-Only Member and a Netting Member. The term "Member" also currently includes a Sponsoring Member in its capacity as a Sponsoring Member and a Sponsored Member, each to the extent specified in Rule 3A and a CCIT Member to the extent specified in Rule 3B.

¹⁷ Fixed Income Clearing Corp., *supra* n. 5, at 110, 111 (Rule 3, Sections 1 and 2).

apply to existing Netting Members, as FICC’s rulebook currently requires that eligibility and qualifications for new members “must be met at all times” while a Netting Member.¹⁸ These myriad, overlapping, subjective and discretionary provisions from just one of potentially a number of clearing agencies for U.S. Treasury securities risk creating an avalanche of information gathering. Ongoing membership requirements should be clear and precise (e.g., capital and liquidity standards) and be similar across all relevant clearing agencies.

FIA members are further concerned that these requests and other changes to membership criteria might require Netting Members to make disclosures of confidential communications that exceed the bounds of what any other central clearing counterparty requests. This is a particular concern for non-U.S. Netting Members. If FICC intends to require non-U.S. Netting Members to provide information about communications with their home regulators, these Netting Members will need to address any potential issues with their regulators and ensure that they can comply with the Rules and their home jurisdiction’s laws and regulations.

To avoid confusion, and unnecessary costs and compliance burdens for Netting Members, FICC should explicitly clarify which of its ongoing membership requirements apply to new applicants and existing Netting Members, and coordinate these requirements with future clearing agencies.

VII. FICC’s Proposed Fines Should Not Apply if Remediation Is in Process

FICC should revise its newly introduced penalties so that they do not apply if Netting Members are remediating noncompliance. The Proposal imposes various fines that recur periodically over short timelines, which would encourage quick remediation that may not effectively address the actual problem.¹⁹ Remediation can be time-consuming, and fines should be tolled while a Netting Member is working in good faith to redress a compliance issue. Longer grace periods should be put in place before fines are applied, or fines should be limited to instances when a Netting Member is not cooperating to FICC’s reasonable satisfaction.

¹⁸ *Id.* at 110 (Rule 3, Section 1) (“The eligibility, qualifications and standards set forth in Rule 2A in respect of an applicant shall continue to be met upon an applicant’s admission as a Member and at all times while a Member.”) In addition, Section 7(a) of Rule 3 requires a Netting Member to notify FICC when it no longer complies with relevant qualifications for admission to membership. *See id.* at 118-119. It is also not clear whether FICC intends to apply its right to deny netting membership where personnel in senior management roles do not possess the appropriate “industry experience” and “history of compliance” as an ongoing membership requirement for all members and how it will do so. *Id.* at 110 (Rule 2A, Section 4).

¹⁹ Penalties for noncompliance include: (1) \$10,000 for failure to submit the Annual Attestation, on the Business Day following the due date, repeated every 10 Business Days until the attestation is provided to FICC; (2) \$15,000 for failure to submit the triennial report, on the Business Day following the due date, repeated every 10 Business Days until the report is provided to FICC, including in the instance where FICC requires a Netting Member to re-perform the review and re-submit the report; and (3) \$20,000 for a trade submission failure that FICC has, in its sole discretion, determined not to be appropriately remediated, repeated every 30 Business Days until FICC determines that the failure has been remediated. FICC will report a Netting Member to the SEC unless it cures an issue of noncompliance within 10 Business Days. *See id.* at 148-150 (Fine Schedules).

VIII. The Commission and FICC Need to Consider the Extra-Territorial Impact of the Trade Submission Requirement and Provide Relief As Appropriate

The Commission should issue no-action relief to U.S. Netting Members to provide enough time for them to comply with the trade submission requirement with respect to relevant non-U.S. jurisdictions. The Proposal requires all Netting Members to submit for clearing repo trades in U.S. Treasury securities when they are a counterparty to the transaction, with limited exceptions. Therefore, a Netting Member must submit for clearing U.S. Treasury securities with non-U.S. counterparties that may not be familiar with the SEC's U.S. Treasury securities clearing mandate or the Proposal and related rules. Because non-U.S. counterparties that are unfamiliar with the SEC's requirements may be hesitant to enter into new documentation without adequate education about the SEC's and FICC's requirements, Netting Members will need additional time to enter into the appropriate arrangements with these types of counterparties to comply with the trade submission requirement.

Moreover, the cross-border recognition of FICC and the cross-border impact of the U.S. Treasury securities clearing mandate are in their infancy, and Netting Members—and likely FICC, for that matter—have not yet contemplated all the issues that might arise. It is not known at this time whether regulated entities operating in non-U.S. jurisdictions may face obstacles to achieving compliance with the Treasury Clearing Rules. For example, FIA understands that some regulatory bodies in non-U.S. jurisdictions must recognize FICC as a clearing agency to prevent Netting Members organized in such jurisdictions from incurring negative capital treatment or other adverse regulatory consequences. Time zone differences need to be sorted out, even if FICC extends its timeline by a few hours for accepting submission of trades for novation, as FIA understands is underway. FICC's counterparty risk protocols do not allow it to accept Sponsored Members from certain jurisdictions where robust close-out netting and bankruptcy comfort are unavailable.²⁰ Counterparties in those jurisdictions may need to access the U.S. Treasury market in some other way, such as by entering into trades offshore with non-Netting Members over which U.S. regulators may have limited oversight. This sort of outcome would be an unintended consequence of a rushed effort to apply the trade submission requirement extra-territorially without exception.

FIA suggests that the SEC and FICC consider a limited exception to permit uncleared trades in U.S. Treasury securities between a Netting Member, its foreign affiliates or foreign branches and counterparties in jurisdictions not on FICC's (and any other clearing organization's) approved jurisdiction list. A limit could be placed on how large those trades could be as compared to all trades entered into by the Netting Member or its foreign branch and foreign affiliates. A sufficiently long time period would need to be provided, along with coordinated notice and comment across clearing agencies, before trades with counterparties in jurisdictions newly added

²⁰ See FIXED INCOME CLEARING CORP., *Jurisdictions Approved by FICC for Sponsored Members* (Effective Date: Jul. 17, 2024, Last Visited: Jul. 21, 2024), <https://www.dtcc.com/-/media/Files/Downloads/Clearing-Services/Approved-FICC-Jurisdictions-for-Sponsored-Members.pdf> (listing a limited number of jurisdictions approved by FICC for Sponsored Members).

to the list would become subject to the clearing requirement. This approach is similar to the CFTC's 2013 approach in respect of its clearing mandate for swaps between a foreign branch of a U.S. swap dealer and a non-U.S. person in certain foreign jurisdictions. FIA requests that the SEC and FICC provide for an exception along these lines for trades with counterparties in non-approved jurisdictions.²¹

In addition, the Rules inexplicably render non-U.S. banks to be Bank Netting Members through their U.S. branches' or agencies' netting membership, causing such non-U.S. banks to become subject to the Rules globally. As a result, the trade submission requirement would apply to Bank Netting Members as a whole irrespective of their location and the location of their branches. This outcome is not required under the SEC's clearing mandate. FICC does not explain why it altered its Rules in this manner or how doing so could impact the U.S. Treasury securities market. Non-U.S. banks could be disincentivized to access FICC and subject themselves to all of FICC's requirements for all of its transactions world-wide in U.S. Treasury securities. FIA requests that FICC not make this change to its Rules. FICC should retain the existing recognition that non-U.S. banks can participate in FICC solely through their branches or agencies.

FIA acknowledges that FICC is required to monitor for compliance with the trade submission requirement, and that a compliance attestation framework could be an effective means for FICC, and other clearing agencies as applicable, to carry out their regulatory mandate. However, the compliance framework must be properly tailored and fit for purpose. FIA urges FICC to remove costly, unnecessary redundancies and modify the Proposal to enable Netting Members to more effectively comply with its requirements while allowing FICC to adhere to its oversight obligations.

Further, the SEC's and FICC's goal should be to avoid business disruptions for Netting Members coming into compliance with the trade submission requirement. The Proposal introduces several ambiguities and raises issues in the cross-border context that need more time to be addressed and resolved. FIA respectfully reiterates its request that the Commission provide more time for Netting Members to come into compliance with the mandatory clearing requirement in the cross-border context or provide exemptions for transactions with certain non-U.S. counterparties, as appropriate.

²¹ CFTC Interpretative Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45,292, 45,369 (July 26, 2013).

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August 6, 2024

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FIA appreciates the opportunity to provide comments to the Commission on the Proposal. If you have any questions about FIA's comments, please do not hesitate to contact Allison Lurton, General Counsel and Chief Legal Officer, at 202.466.5460 or alurton@fia.org.

Respectfully submitted,

A handwritten signature in cursive script that reads "Walt Lukken".

Walt L. Lukken
President and Chief Executive Officer