

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-66989; File No. SR-FICC-2012-03)

May 15, 2012

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Approving Proposed Rule Change to Expand the One-Pot Cross-Margining Program with New York Portfolio Clearing, LLC to Certain “Market Professionals”

I. Introduction

On March 20, 2012, the Fixed Income Clearing Corporation (“FICC”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change SR-FICC-2012-03 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4² thereunder. The proposed rule change was published for comment in the Federal Register on April 4, 2012.³ The Commission received one comment letter on the proposed rule change.⁴ This order approves the proposed rule change.

II. Description

This rule change consists of modifications to certain rules of the Government Securities Division (“GSD”) of FICC in order to expand FICC’s existing one-pot cross-margining program with New York Portfolio Clearing, LLC (“NYPC”)⁵ (“Proprietary Cross-Margining Program”)

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 66679 (March 29, 2012), 77 FR 20445 (April 4, 2012).

⁴ Letter from Adam Cooper, Senior Managing Director and Chief Legal Officer, Citadel LLC (April 23, 2012).

⁵ See Securities Exchange Act Release No. 34-63986 (February 28, 2011), 76 FR 12144 (March 4, 2011).

to include eligible positions held by GSD Netting Members and NYPC Clearing Members for certain “market professionals.”⁶

Overview

In its present form, the Proprietary Cross-Margining Program is limited to cross-margining of proprietary accounts. Specifically, from NYPC’s perspective, only a member’s proprietary or “house” account is eligible for cross-margining; from GSD’s perspective, all accounts maintained by GSD for its Netting Members are deemed proprietary.⁷ The proposed

⁶ The NYPC-FICC “market professional” cross-margining program aims to closely replicate the Options Clearing Corporation (“OCC”)-Chicago Mercantile Exchange (“CME”) cross-margining program, which was first approved in 1989 (Securities Exchange Act Release No. 34-27296 (September 26, 1989), 54 FR 41195 (October 5, 1989)) and was expanded in 1991 to include market professionals (Securities Exchange Act Release No. 34-29991 (November 26, 1991), 56 FR 61458 (December 3, 1991)). Since that time, the Commission has approved several similar “market professional” cross-margining programs, including most recently in 2008. They include: OCC-Intermarket Clearing Corporation (“ICC”) Securities Exchange Act Release No. 34-30041 (December 5, 1991), 56 FR 68424 (December 12, 1991); OCC-ICC-CME Securities Exchange Act Release No. 34-32534 (June 28, 1993), 58 FR 36234 (July 6, 1993); OCC-Board of Trade Clearing Corporation Securities Exchange Act Release No. 34-32681 (July 27, 1993), 58 FR 41302 (August 3, 1993); OCC-Kansas City Board of Trade Clearing Corporation (“KCBOT”) Securities Exchange Act Release No. 34-32708 (August 2, 1993), 58 FR 42586 (August 10, 1993); OCC-ICC-Commodity Clearing Corporation (“CCC”) Securities Exchange Act Release No. 34-33272 (December 2, 1993), 58 FR 64997 (December 10, 1993); OCC-ICC, OCC-ICC-CME, OCC-KCBOT Securities Exchange Act Release No. 34-36819 (February 7, 1996), 61 FR 5594 (February 13, 1996); OCC-CME- Securities Exchange Act Release No. 34-38584 (May 8, 1997), 62 FR 26602 (May 14, 1997); and OCC-ICE Clear Securities Exchange Act Release No. 34-57118 (January 9, 2008), 73 FR 2970 (January 16, 2008).

⁷ The GSD does not have segregated accounts for Netting Members’ customers. In contrast, NYPC currently maintains both proprietary and segregated customer accounts for its Clearing Members in compliance with applicable Commodity Futures Trading Commission (“CFTC”) regulations. Only NYPC Clearing Members’ proprietary accounts at NYPC are eligible for participation in the Proprietary Cross-Margining Program. The present proposal would introduce a third type of account at NYPC that NYPC Clearing Members may maintain, *i.e.*, the Market Professional account. The present proposal also introduces a second type of account at GSD, *i.e.*, the Market Professional account.

rule change expands the Proprietary Cross-Margining Program to non-proprietary accounts carried by participating GSD Netting Members on behalf of “Market Professionals” (“Market Professional Cross-Margining Program”). The proposed rule change defines “Market Professional” as an entity, other than a “non-customer,”⁸ that is a member of a designated contract market and that actively trades for its own account products that are eligible under the cross-margining agreement between FICC and NYPC (“FICC-NYPC Cross-Margining Agreement”)⁹ for cross-margining (“Eligible Products”).¹⁰ Positions and collateral held for Market Professionals will be maintained in accounts that are distinct from both proprietary cross-margining accounts and non-cross-margining accounts.¹¹

As with the current Proprietary Cross-Margining Program, the proposed Market Professional Cross-Margining Program would be available to GSD Netting Members that carry

⁸ Consistent with previously approved market professional cross-margining programs, FICC’s rules define “Non-Customer” as GSD Netting Members and other persons whose accounts with GSD Netting Members would not be the accounts of “customers” within the meaning of SEC Rules 8c-1 and 15c2-1.

⁹ The FICC-NYPC Cross-Margining Agreement was approved by the Commission as part of FICC’s Rule Filing No. SR-FICC-2010-09. See note 5, supra.

¹⁰ As defined in the FICC-NYPC Cross-Margining Agreement, the term “Eligible Products” includes U.S. Government securities, securities of U.S. federal agencies and U.S. Government-sponsored enterprises, financing products and certain mortgage-backed securities cleared by FICC, and futures contracts and options on futures contracts, including U.S. dollar-denominated interest rate and fixed income futures contracts and options on futures contracts, cleared by NYPC. Formal inclusion of options on futures in the program will be the subject of a separate rule filing with the Commission.

¹¹ As described above, GSD Netting Members who wish to participate in the Market Professional Cross-Margining Program will need to open an additional account for their Market Professionals. Likewise, NYPC Clearing Members wishing to participate in the program will need to open an additional account for their Market Professionals, which will be required to be separate and distinct from both their proprietary and segregated customer accounts.

accounts of Market Professionals and that are also clearing members of NYPC (“Joint Member”) or that have an affiliate that is a clearing member of NYPC (“Affiliated Member”). Members do not have to be participating in the Proprietary Cross-Margining Program in order to participate in the proposed Market Professional Cross-Margining Program (or vice versa).

The proposed rule change necessitates revisions to the FICC-NYPC Cross-Margining Agreement, which are described in detail below. Additional participant agreements have been added as appendices to the FICC-NYPC Cross-Margining Agreement for this purpose.

Segregation and Liquidation Considerations

The proposed Market Professional Cross-Margining Program addresses concerns regarding segregation and liquidation procedures under the Commodity Exchange Act (“CEA”),¹² Title 11 of the United States Code (“Bankruptcy Code”)¹³ and the Securities Investor Protection Act (“SIPA”).¹⁴ The CEA requires that the property of customers must be segregated from the proprietary property of a futures commission merchant. Because Market Professionals are considered “customers” under CFTC regulations, the cross-margined positions of the Market Professionals and all property related thereto must be segregated from the cross-margined positions and property of the GSD Netting Member that carries their accounts.

Under the proposed rule change, each GSD Netting Member electing to participate in the Market Professional Cross-Margining Program must execute a Cross-Margining Participant Agreement for Market Professional Accounts and must establish a separate cross-margining account for the benefit of Market Professionals for whom it carries cross-margined positions

¹² 7 U.S.C. 1–27f as amended.

¹³ 11 U.S.C. 101–1532 as amended.

¹⁴ 15 U.S.C. 78aaa–78lll as amended.

(“Market Professional Cross-Margining Account”). GSD Netting Members and NYPC Clearing Members who establish Market Professional Cross-Margining Accounts must also obtain the consent of each Market Professional whose cross-margined positions are carried in such account to the commingling of the Market Professional’s assets with those of other electing Market Professionals of the same GSD Netting Member and NYPC Clearing Member (or permitted margin affiliate at NYPC); provided, however, that consistent with the requirements of CFTC Regulation 39.13(g)(8)(i) (gross margin for customer accounts), the positions of a Market Professional cleared by FICC will only be cross-margined with the derivatives positions of the same Market Professional cleared by NYPC. Moreover, because Section 4d(a)(2) of the CEA prohibits commingling futures and securities in the absence of a CFTC rule, regulation or order to the contrary, it will be necessary for NYPC to obtain from the CFTC an order stating that Eligible Products that are cleared by FICC and property received by a participating GSD Netting Member to margin, guarantee, or secure trades or positions in or accruing as a result of such Eligible Products may be commingled in a Market Professional Cross-Margining Account with Eligible Products cleared by NYPC and with property received by a participating NYPC Clearing Member to margin, guarantee, or secure trades or positions in or accruing as a result of such Eligible Products that would otherwise be required by the CFTC to be segregated under the CEA.

FICC has established procedures to facilitate the segregation of the funds and securities deposited or received by GSD Netting Members regarding their Market Professional cross-margining activity. For example, each GSD Netting Member must establish separate bank accounts for the purpose of making daily funds-only settlement of its proprietary cross-margining activity and for the purpose of making daily funds-only settlement of its Market

Professional cross-margining activity. In addition, FICC and NYPC will establish and use separate bank accounts for paying and collecting cash margin and funds-only settlement amounts resulting from members' proprietary cross-margining activities and for paying and collecting such amounts resulting from members' market professional cross-margining activity. FICC will not permit the netting of obligations arising out of a GSD Netting Member's proprietary cross-margining activity with those arising out of its Market Professional cross-margining activity.

FICC has also taken steps to assure the segregation of securities that are deposited with FICC or its agents to satisfy Clearing Fund requirements in Market Professional Cross-Margining Accounts and proprietary cross-margining accounts. For example, FICC and NYPC will establish and use separate custody accounts to hold securities deposited as margin by members for proprietary cross-margining activity and to hold securities deposited as margin by members for Market Professional cross-margining activity.

FICC's proposal also addresses the potential for conflict between SIPA, Subchapter IV of chapter 7 of the Bankruptcy Code,¹⁵ and corresponding CFTC bankruptcy regulations,¹⁶ in the event of the liquidation and distribution of the property and funds of a GSD Netting Member that is a registered broker-dealer.¹⁷ To establish uniform results in the event of the bankruptcy or liquidation of a broker-dealer GSD Netting Member under SIPA, FICC will require each Netting

¹⁵ 11 U.S.C. 761–767.

¹⁶ 17 CFR Part 190.

¹⁷ Some Market Professionals could be deemed to be “customers” under SIPA and Exchange Act Rule 15c3-3. Consistent with previously approved cross-margining programs, however, Market Professionals will be required to agree to subordinate their claims, in the event of the bankruptcy of a GSD Netting Member or an NYPC member, to the claims of other customers. See Securities Exchange Act Release No. 34-29991 (November 26, 1991), 56 FR 61458 (December 3, 1991) n.23.

Member that chooses to participate in the Market Professional Cross-Margining Program to require that the GSD Netting Member's participating Market Professionals agree that in the event of the bankruptcy or liquidation of the GSD Netting Member carrying its cross-margined positions, the Market Professional will subordinate its cross-margining related claims to the claims of the firm's non-cross-margining customers.¹⁸ Similarly, each participating Market Professional must acknowledge that all of the assets carried in a GSD Netting Member's Market Professional Cross-Margining Account on the Market Professional's behalf will not be deemed "customer property" for purposes of SIPA or give rise to any claim thereunder. This means that in the event of a GSD Netting Member bankruptcy, all claims to assets in cross-margining accounts will be determined under Subchapter IV of chapter 7 of the Bankruptcy Code and applicable CFTC regulations. FICC believes these measures reduce the possibility that assets in a GSD Netting Member's Market Professional Cross-Margining Account will be subject to two conflicting schemes of distribution.

In the event of a default of a member that chooses to participate in the Market Professional Cross-Margining Program, FICC and NYPC will follow the remedies outlined in the FICC-NYPC Cross-Margining Agreement to liquidate or transfer the proprietary and Market Professional Cross-Margining Accounts. Any deficit in the Market Professional Cross-

¹⁸ Under SIPA, SIPC satisfies the claims of "customers" against insolvent broker-dealers up to predetermined limits. 15 U.S.C. 78fff-3. Under SIPA, however, the term "customer" does not include any person to the extent that such person has a claim for cash or securities which, by agreement, is subordinated to the claims of any or all creditors of the debtor. 15 U.S.C. 78lll(2)(C)(ii). Because a Market Professional will be required to subordinate its cross-margin related claims against a GSD Netting Member to those of the GSD Netting Member's non-cross-margining customers, it will not fall within the protections afforded by SIPA. See Securities Exchange Act Release No. 34-29991(November 26, 1991), 56 FR 61458 (December 3, 1991) n.24.

Margining Account would, absent a deficit in any NYPC segregated customer account of the defaulting member, be offset against any credit in any proprietary cross-margining account of the defaulting member. Non-cross-margining accounts at NYPC would be liquidated or transferred pursuant to NYPC procedures as they exist today. FICC and NYPC will not offset a credit in a Market Professional Cross-Margining Account with a deficit in a proprietary cross-margin account or with any other account FICC or NYPC maintains for the defaulting member. Thus, any surplus in the Market Professional Cross-Margining Account will be returned to the member or its representative.

In the event of a member bankruptcy, the Bankruptcy Code exempts FICC and NYPC from the automatic stay and permits FICC and NYPC to liquidate any assets held for the insolvent member¹⁹ and offset those assets against the member's liabilities.²⁰ Assets of the member held in the Market Professional Cross-Margining Account will only be set-off against related Market Professional cross-margining liabilities. Any assets remaining after such a set-off will be transferred to the bankruptcy trustee for administration and distribution.²¹

If a member becomes insolvent, the Securities Investor Protection Corporation ("SIPC") may and probably will file for a protective decree under SIPA.²² SIPC will then appoint a trustee charged with liquidating the bankrupt estate, consistent with SIPA. Under SIPA, the trustee

¹⁹ 11 U.S.C. 555, 556, 560, and 561.

²⁰ 11 U.S.C. 362(b)(6), 362(b)(17), 362(b)(27), and 561.

²¹ In the situation where an Affiliated Member becomes insolvent, assets in the Market Professional Cross-Margin Accounts of FICC and NYPC will be set-off by FICC and NYPC against related liabilities in such accounts.

²² 11 U.S.C. 742.

must, to the extent not inconsistent with SIPA, administer the assets of the member held as a commodity broker in accordance with the Bankruptcy Code's commodity broker liquidation requirements and applicable CFTC regulations.²³ Even if SIPC does not exercise its power to seek appointment of a trustee and SIPA does not apply to the liquidation, a Market Professional's claims to assets in the Market Professional Cross-Margining Account will be determined in accordance with the Bankruptcy Code's commodity broker liquidation scheme contained in Subchapter IV of chapter 7 and applicable CFTC regulations.

Generally, applicable sections of the Bankruptcy Code and CFTC regulations provide for the trustee to distribute "customer property"²⁴ pro rata among "customers"²⁵ according to account class and generally give priority to customer claims over all others, except those dealing with the administration of the bankrupt estate.²⁶ Also, assuming the trustee does not transfer customer accounts to another firm and determines to liquidate customer accounts, the trustee will distribute customer property to the claimants.²⁷ If there is a shortfall in the Market Professional Cross-Margining Account and there is no shortfall or a lesser shortfall in the non-cross-margining customer account, Market Professionals will have a claim against the Market Professional Cross-Margining Account and will be able to claim against the non-cross-margining customer account

²³ 15 U.S.C. § 78fff-1(b) states in part: "To the extent consistent with the provisions of this chapter or as otherwise ordered by the court, a trustee shall be subject to the same duties as a trustee in a case under chapter 7 of Title 11, including, if the debtor is a commodity broker, as defined under section 101 of such title, the duties specified in subchapter IV of such chapter 7."

²⁴ As defined in 11 U.S.C. 761(10) and 17 CFR § 190.01(n).

²⁵ As defined in 11 U.S.C. 761(9).

²⁶ 11 U.S.C. 766(h); see 17 CFR 190.08.

²⁷ See generally 11 U.S.C. 766 and 17 CFR 190.08.

only after all non-cross-margining customer claims have been satisfied. If the shortfall in the non-cross-margining customer account is equal to or greater than the shortfall in the Market Professional Cross-Margining Account, the two accounts will be combined and Market Professionals and non-cross-margining customers will share on a pro rata basis.²⁸

Proposed Changes to the FICC-NYPC Cross-Margining Agreement

In addition to certain technical corrections and conforming changes, the FICC-NYPC Cross-Margining Agreement would be substantively amended as described below in order to incorporate the proposed Market Professional Cross-Margining Program. Capitalized terms used in this section have the meanings given to them in the FICC-NYPC Cross-Margining Agreement.

Recitals

The Recitals to the FICC-NYPC Cross-Margining Agreement would be amended to describe the proposed expansion of the existing FICC-NYPC Cross-Margining Agreement to provide for the cross-margining of the accounts of Market Professionals, and also to reflect the fact that the current FICC-NYPC Cross-Margining Agreement was executed on March 4, 2011, after receipt of the necessary regulatory approvals by FICC and NYPC.

Section 1. Definitions

Section 1(f) (Available Assets) and Section 1(tt) (Margin)

The “Available Assets” definition would be amended to include as assets available in the event of a default any margin posted to the Defaulting Member’s Proprietary Cross-Margining Account, as well as any margin posted to the Defaulting Member’s Market Professional Cross-Margining Account. The “Margin” definition would be similarly amended to include original margin, option premiums and other margin collateral held by or for the account of FICC or

²⁸ See 17 CFR Part 190, Appendix B (Framework 1).

NYPC to secure the obligations of a Cross-Margining Participant's Proprietary Cross-Margining Account and/or its Market Professional Cross-Margining Account.

The "Available Assets" definition would be further amended to clarify that, consistent with the distributional convention established in Appendix B to Part 190 of the CFTC's Regulations, the NYPC Guaranty Fund deposits of a Defaulting Member would first be applied to any deficit in the Customer Funds Account of the Defaulting Member carried by NYPC, and then, after any such deficit has been completely satisfied, to any Cross-Margin Loss in the Defaulting Member's Market Professional Cross-Margining Account carried by NYPC, and then finally to any Cross-Margin Loss in the Defaulting Member's Proprietary Cross-Margining Account carried by NYPC.

Section 1(t) (Cross-Margin Gain) and Section 1(u) (Cross-Margin Loss)

For ease of reference and to facilitate understanding of the loss allocation mechanism in the event of the liquidation of the cross-margined positions carried for a Defaulting Member by FICC and NYPC, the definitions of Cross-Margin Gain and Cross-Margin Loss would become a new subsection (b) of Section 7 of the FICC-NYPC Cross-Margining Agreement (Suspension and Liquidation of Cross-Margining Participant).

Section 1(y) (Customer Funds Account)

The term "Segregated Funds Account" in the existing FICC-NYPC Cross-Margining Agreement would be replaced by the term "Customer Funds Account" and modified in order to clearly distinguish non-cross-margining "customer" accounts established by NYPC from both Market Professional Cross-Margining Accounts and Proprietary Cross-Margining Accounts.

Section 1(ww) (Market Professional)

As described above, consistent with previously approved cross-margining programs, the term “Market Professional” would be defined as an entity, other than a “Non-Customer” (described below), that is a member of a designated contract market and that actively trades for its own account Eligible Products that are eligible for cross-margining under the FICC-NYPC Cross-Margining Agreement.

Section 1(bbb) (Non-Customer)

As described above, “Non-Customers” would be excluded from the definition of a Market Professional. With respect to a GSD Netting Member, the term “Non-Customer” would be defined as such GSD Netting Member or other person whose account with such GSD Netting Member would not be the account of a “customer” within the meaning of SEC Rules 8c-1 and 15c2-1.

Section 1(sss) (Securities Custody Account) and 1(uuu) (Settlement Account)

For ease of reference, the term “Cross-Margining Securities Account” would be replaced with the term “Securities Custody Account” and would be expanded to include a custody account to hold Margin in the form of securities deposited by a Cross-Margining Participant in respect of a Proprietary Cross-Margining Account or a Market Professional Cross-Margining Account.

Similarly, the definition of “Settlement Account” would be expanded to include a bank account established to hold cash Margin deposited by a Cross-Margining Participant in respect of a Proprietary Cross-Margining Account or a Market Professional Cross-Margining Account.

Section 2. Participation

Section 2(a) would be amended and Section 2(b) and 2(c) would be added in order to accommodate the additional documentation required to establish a Set of Market Professional

Cross-Margining Accounts by either a Joint Clearing Member or by a Clearing Member and its Cross-Margining Affiliate.

Section 5. Forms of Margin; Holding Margin

Section 5(b) would be amended to reflect the fact that separate Settlement Accounts and Securities Custody Accounts would be maintained for proprietary and Market Professional cross-margining activity.

Section 5(c) would be amended to allow FICC and NYPC to hold cash and securities posted with respect to cross-margining activity in either separate accounts or, consistent with previously approved cross-margining programs, joint accounts titled in the names of FICC and NYPC.

Section 7. Suspension and Liquidation of Cross-Margining Participant

Section 7(a) would be amended to clarify that the positions and Margin of a Defaulting Member may be liquidated or transferred to one or more non-defaulting Clearing Members.

A new Section 7(b) would be added to define “Cross-Margin Gain” and “Cross-Margin Loss,” as described above. New Section 7(b) would also make clear that in calculating its Cross-Margin Gain (or Cross-Margin Loss) or Net Gain (or Net Loss) FICC and NYPC would be required to make separate calculations with respect to the Defaulting Member’s Proprietary Cross-Margining Account and its Market Professional Cross-Margining Account.

Section 7(g) would be amended to provide that to the extent that pursuant to the loss allocation prescribed in Section 7, both FICC and NYPC owe payments to each other, *i.e.*, one clearing organization owes a payment with respect to the Proprietary Cross-Margining Account of a Defaulting Member and the other owes a payment with respect to the Defaulting Member’s

Market Professional Cross-Margining Account, those two payments may be netted and setoff against each other.

Proposed Changes to Clearing Member Agreements

The FICC-NYPC Cross-Margining Agreement is solely between FICC and NYPC. Members of FICC and of NYPC that wish to participate in the Cross-Margining Program must become party to a Clearing Member Cross-Margining Agreement which, among other things, reflects the Clearing Member's agreement to be bound by the Rules applicable to cross-margining and to the provisions of the FICC-NYPC Cross-Margining Agreement ("Clearing Member Agreements"). Capitalized terms used in this section have the meanings given to them in the proposed Clearing Member Agreements.

The current FICC-NYPC Cross-Margining Agreement includes two forms of Clearing Member Agreement — one for joint Clearing Members (*i.e.*, entities that are members of both FICC and NYPC), the other for Clearing Members that are Affiliates of each other (*i.e.*, a Clearing Member of either FICC or NYPC that directly or indirectly controls, is controlled by, or under common control with a Clearing Member of the other Clearing Organization). Those agreements, which are set forth as Appendix A and Appendix B to the FICC-NYPC Cross-Margining Agreement, would be renamed as Clearing Member Cross-Margining Agreement (Joint Clearing Member – Proprietary Accounts) and Clearing Member Cross-Margining Agreement (Affiliated Clearing Members – Proprietary Accounts), and references in those agreements to a "Member" would be replaced with references to a "Clearing Member" for consistency with the terminology used in the FICC-NYPC Cross-Margining Agreement.

The Clearing Member Agreements for Proprietary Accounts are proposed to be further modified to make clear that a Set of Proprietary Cross-Margining Accounts would be combined

and treated as a single account for purposes of calculating Margin. This change is reflective of the current practice of the Clearing Organizations pursuant to the Cross-Margining Agreement and is proposed to be set out solely for purposes of clarity.

The Clearing Member Agreements would additionally be modified to reflect the practice of the Clearing Organizations regarding the use of Clearing Data (as that term is defined in the Clearing Member Cross-Margining Agreements). Specifically, the Clearing Member Agreements would be modified to provide that Clearing Data may only be disclosed (i) to an Affiliated Clearing Member, where applicable, (ii) in accordance with the provisions of Section 10 of the Cross-Margining Agreement, and (iii) in aggregated form, provided that such aggregated Clearing Data does not identify of the Clearing Member or Affiliated Clearing Members, as applicable, as the source thereof.

The termination provisions of the Clearing Member Agreements for Proprietary Accounts would also be modified to make clear that the required acknowledgment of a Clearing Member's termination of the Agreement will be given by the Clearing Organizations promptly after the two Business Day notice period required by the Clearing Member Agreements. The termination provisions would additionally be modified to make explicit that a Clearing Member's continuing obligations under the Clearing Member Agreements and the Cross-Margining Agreement survive the termination of the Clearing Member Agreement only to the extent those obligations arose prior to such termination.

Finally, the Clearing Member Cross-Margining Agreement (Affiliated Clearing Members – Proprietary Accounts) is proposed to be amended to include a waiver of the Clearing Members' and the Clearing Organizations' right to jury trial in any dispute arising in connection with that agreement. A comparable provision already is included in the Clearing Member Cross-

Margining Agreement (Joint Clearing Member – Proprietary Accounts). The remaining revisions to the Clearing Member Agreements for Proprietary Accounts are non-substantive or conforming.

While it is anticipated that some Clearing Members will elect to participate in cross-margining for their Proprietary Accounts and also act as Clearing Member for Market Professionals, a Clearing Member could elect to act in only one of those capacities. The Clearing Member Agreements in Appendices A and B to the FICC-NYPC Cross-Margining Agreement, therefore, would be complemented by a Clearing Member Cross-Margining Agreement (Joint Clearing Member – Market Professional Accounts) and Clearing Member Cross-Margining Agreement (Affiliated Clearing Members – Market Professional Accounts), respectively, and a Clearing Member that elected to maintain a Set of Proprietary Cross-Margining Accounts and a Set of Market Professional Cross-Margining Accounts would be required to enter into Clearing Member Cross-Margining Agreements for both its Proprietary Accounts and for its Market Professional Accounts.

The proposed Clearing Member Agreements for Market Professional Accounts (Appendices C and D to the FICC-NYPC Cross-Margining Agreement) are based upon the Clearing Member Agreements for Proprietary Accounts, but have been modified as appropriate. For example, the Clearing Member Agreements for Market Professional Accounts would make explicit that the Set of Market Professional Cross-Margining Accounts that would be established by the Clearing Organizations for a Clearing Member are to be limited to transactions and

positions established by Market Professionals who have signed a Market Professional Agreement for Cross-Margining in the form set forth as Exhibit A to Appendices C and D, respectively.²⁹

The Market Professional Agreements are derived from the form of Market Professional's Agreement for Cross-Margining that has previously been approved by the Commission.³⁰ The FICC-NYPC Market Professional Agreements differ from the forms of agreement that have previously been approved in that they would be modified to reference the Eligible Products that are available for cross-margining under the FICC-NYPC Cross-Margining Agreement. The FICC-NYPC Market Professional Agreements additionally would be modified to reference the definitions of the term "Market Professional" that would be set forth in the Rules of FICC and NYPC, and to require a Market Professional to represent and warrant that it does, in fact, qualify as such. Moreover, the FICC-NYPC Market Professional Agreements would be amended to provide that, consistent with the requirements of CFTC Regulation 39.13(g)(8)(i) (gross margin for customer accounts), the positions of a Market Professional cleared by FICC will only be cross-margined with the derivatives positions of the same Market Professional cleared by NYPC. The only other substantive change from the form of agreement previously approved by the

²⁹ Similar to the Clearing Member Agreements for Proprietary Accounts, the Clearing Member Agreements for Market Professional Accounts would require the Clearing Member to pledge, for itself and for each Market Professional on whose behalf positions are carried in a Set of Market Professional Cross-Margining Accounts, the positions and Margin in the Set of Market Professional Cross-Margining Accounts. Consistent therewith and with the Clearing Member Agreements for Proprietary Accounts, the Clearing Member Agreements for Market Professional Accounts would include representations and warranties by the Clearing Member to the effect that it has the power to grant the foregoing security interest and that it is the sole owner of or otherwise has the right to transfer collateral to the Clearing Organizations.

³⁰ See Exhibits 5F and 5G to Release No. 34-57118 (January 9, 2008) (Options Clearing Corporation – ICE Clear US market professional cross-margining); see also Securities Exchange Act Release No. 34-29991 (November 26, 1991), 56 FR 61458 (December 3, 1991) (Options Clearing Corporation – Chicago Mercantile Exchange market professional cross-margining).

Commission would be the elimination of a provision that would have conditioned the effectiveness of the Market Professional Agreements on the receipt of all necessary approvals by the Commission and the CFTC. FICC believes that a provision of this nature is unnecessary, given that FICC and NYPC will not permit Clearing Members to enter into Market Professional Agreements until all necessary regulatory approvals have been obtained.

Proposed FICC Rule Changes

In addition to the proposed changes to the FICC-NYPC Cross-Margining Agreement, FICC is proposing the following GSD rule changes to effectuate the Market Professional Cross-Margining Program. Capitalized terms used in this section have the meanings given to them in the GSD Rules.

Rule 1 (Definitions)

New definitions are being added for the following terms: “Market Professional,” “Market Professional Agreement for Cross-Margining,” “Market Professional Cross-Margining Account,” “Non-Customer,” “NYPC Market Professional Account,” and “NYPC Proprietary Account” (which retains the current definition of “NYPC Account”). “NYPC Account,” an existing term, is now proposed to be amended to encompass the two new terms of “NYPC Market Professional Account” and “NYPC Proprietary Account.” In addition, changes are proposed to the following definitions to reference the concepts associated with the Market Professional Cross-Margining Program: “Account,” “Cross-Margining Affiliate,” “Cross-Margining Agreement” and “Margin Portfolio.” A technical change is being proposed to the definition of “Cross-Margining Payment.”

Rule 3 (On-Going Membership Requirements)

FICC is proposing to amend Section 11 of Rule 3, which covers additional accounts requested by Members, to provide for the opening of market professional accounts and to make clear that such accounts must meet the requirements of the Cross-Margining Agreement and the GSD Rules (as with all other accounts carried by FICC for its Members).

Rule 4 (Clearing Fund and Loss Allocation)

FICC is proposing to amend Section 1b and Section 2 of Rule 4 to provide that the market professional account will have its own Clearing Fund calculations separate from the main account of the Netting Member, and that the rules applicable to the Clearing Fund calculations and the requirements of the Required Fund Deposit also apply Clearing Fund calculations and Required Fund Deposits associated with the market professional accounts.

Rule 13 (Funds-Only Settlement)

FICC is proposing to amend Section 1 and Section 5a to provide that funds-only settlement amounts will be calculated separately for the member's market professional account and that net-net funds only credits/debits will also apply to the market professional accounts of a Member (or its permitted margin affiliate) across FICC and NYPC, as is the case currently with the proprietary accounts.

Rule 22A (Procedures for When the Corporation Ceases to Act)

FICC is proposing to amend Section 2 of Rule 22A to provide that a liquidation gain in a Netting Member's proprietary account will be used to offset any resulting liquidation loss in such Member's Market Professional Cross-Margining Account.

Rule 29 (Release of Clearing Data)

FICC is proposing to amend Rule 29 to make clear that a Member's Clearing Data will be released to a futures clearing organization ("FCO") with which FICC has a Cross-Margining Arrangement and that such data will include data regarding the Member's market professional customers.

Rule 43 (Cross-Margining Arrangements)

FICC is proposing to amend Rule 43 to provide for the requirement for Netting Members who wish to participate in the Market Professional Cross-Margining Program to execute the appropriate participation agreements which are appended to the FICC-NYPC Cross-Margining Agreement as discussed above.

III. Comments

The Commission received one comment to the proposed rule change from Citadel, LLC.³¹ The commenter supports the proposed rule change, stating that the proposed rule change would allow market professionals to more effectively manage risk by recognizing the value of offsetting positions cleared by NYPC and FICC. The commenter believes that the proposed rule change will allow market professionals to use their capital more efficiently and will reduce systemic risk by removing excess interconnectedness from the marketplace and optimizing collateral balances. Furthermore the commenter believes that the proposed rule change will further encourage competition in the US futures markets and provides for consumer protection in the event of the bankruptcy of a clearing member in accordance with the CFTC's rules.

³¹ See supra note 4.

IV. Discussion

Section 19(b)(2)(B) of the Act³² directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. In Section 17A(a)(2)(A)(ii) of the Act,³³ Congress directs the Commission to use its authority 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. Sections 17A(b)(3)(A) and (F) of the Act³⁴ require that a clearing agency be organized and its rules designed to facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transactions for which it responsible and to safeguard securities and funds in its custody or control or for which it is responsible. The Commission has carefully considered the proposed rule change and the comment thereto and the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder.³⁵

As the Commission noted in approving the FICC-NYPC Proprietary Cross-Margining Program, the Commission has encouraged cross-margining arrangements as a way to promote more

³² 15 U.S.C. 78s(b)(2)(B).

³³ 15 U.S.C. 78a-1 (a)(2)(A)(ii).

³⁴ 15 U.S.C. 78q-1(b)(3)(A), (F)

³⁵ In approving this proposed rule change, the Commission notes and FICC agrees that FICC will adhere to the conditions to provide information and reports on an ongoing basis that are set forth in the Commission's Order Granting Approval of a Proposed Rule Change to Introduce Cross-Margining of Certain Positions Cleared at the Fixed Income Clearing Corporation and Certain Positions Cleared at New York Portfolio Clearing, LLC, to the extent applicable to "Market Professionals." See note 5, supra.

efficient risk management across product classes.³⁶ Furthermore, cross-margining arrangements are consistent with Section 17A(b)(3)(F) in that they may strengthen the safeguarding of assets through effective risk controls that more broadly take into account offsetting positions of participants in both the cash and futures markets, and promote prompt and accurate clearance and settlement of securities through increased efficiencies. The Commission agrees with the commenter that the proposed rule change will help promote effective risk management and provides for increased efficiencies by taking into account offsetting positions. Moreover, the Commission has repeatedly found that similar cross-margining programs for “Market Professionals” are consistent with clearing agency requirements under Section 17A of the Act.³⁷ Because the Market Professional Cross-Margining Program being approved by this Order helps further linked or coordinated facilities for clearance and settlement of transactions while facilitating their prompt and accurate clearance and settlement and safeguards securities and funds in FICC’s custody or control or for which it is responsible, the Commission believes that the proposed rule change is consistent with Section 17A of the Act and, therefore, is approving FICC’s proposed rule change.

V. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act³⁸ and the rules and regulations thereunder.

³⁶ See note 5, supra.

³⁷ See note 6, supra.

³⁸ 15 U.S.C. 78q-1.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2)³⁹ of the Act, that the proposed rule change (File No. SR-FICC-2012-03) be, and hereby is, approved.⁴⁰

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.⁴¹

Kevin M. O'Neill
Deputy Secretary

³⁹ 15 U.S.C. 78s(b)(2).

⁴⁰ In approving this proposed rule change the Commission has considered the proposed rule's impact of efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁴¹ 17 CFR 200.30-3(a)(12).