

clearing agency and its participants contractually agree to limit the liability of the clearing agency.<sup>11</sup> MBSD's functions are noncustodial in that it does not hold its participants' funds or securities. It is reasonable for MBSD, which is participant-owned and governed, and its participants to agree through board approval of the proposed rule change and to contract with one another in a cooperative arrangement as to how to allocate MBSD's liability among MBSD and its participants. Therefore, the Commission has determined that given the noncustodial nature of MBSD's services, a gross negligence standard of care and limitation of liability is allowable for MBSD.<sup>12</sup>

<sup>11</sup> In the release setting forth standards to be used by the Division of Market Regulation in evaluating clearing agency registration applications, the Division of Market Regulation urged clearing agencies to embrace a strict standard of care in safeguarding participants' funds and securities. Securities Exchange Act Release No. 16900 (June 17, 1980), 45 FR 4192. In the release granting permanent registration to The Depository Trust Company, the National Securities Clearing Corporation, and several other clearing agencies, however, the Commission indicated that it did not believe that sufficient justification existed at that time to require a unique federal standard of care for registered clearing agencies. Securities Exchange Act Release No. 20221 (October 3, 1983), 48 FR 45167. In a subsequent release, the Commission stated that the clearing agency standard of care and the allocation of rights and liabilities between a clearing agency and its participants applicable to clearing agency services generally may be set by the clearing agency and its participants. In the same release, the Commission stated that it should review clearing agency proposed rule changes in this area on a case-by-case basis and balance the need for a high degree of clearing agency care with the effect resulting liabilities may have on clearing agency operations, costs, and safeguarding of securities and funds. Securities Exchange Act Release No. 22940 (February 24, 1986), 51 FR 7169. Subsequently, in a release granting temporary registration as a clearing agency to The Intermarket Clearing Corporation, the Commission stated that a gross negligence standard of care may be appropriate for certain noncustodial functions that, consistent with minimizing risk mutualization, a clearing agency, its board of directors, and its members determine to allocate to individual service users. Securities Exchange Act Release No. 26154 (October 3, 1988), 53 FR 39556. Finally, in a release granting the approval of temporary registration as a clearing agency to the International Securities Clearing Corporation, the Commission indicated that historically it has left to user-governed clearing agencies the question of how to allocate losses associated with noncustodial, data processing, clearing agency functions and has approved clearing agency services embodying a gross-negligence standard of care. Securities Exchange Act Release No. 26812 (May 12, 1989), 54 FR 21691.

<sup>12</sup> The Commission notes that the rule change does not alleviate MBSD from liability for violation of the Federal securities laws where there exists a private right of action and therefore is not designed to adversely affect MBSD's compliance with the Federal securities laws and private rights of action that exist for violations of the Federal securities laws.

The Commission's approval of FICC's proposed rule change establishing a comprehensive standard

#### IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular section 17A of the Act and the rules and regulations thereunder.

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act, that the proposed rule change (File No. SR-FICC-2003-09) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49372; File No. SR-FICC-2003-08]

#### Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Approving Proposed Rule Change To Add Adjustable-Rate Mortgage Pass-Through Securities to the GCF Repo Service Repurchase Service

March 5, 2004.

#### I. Introduction

On August 11, 2003, the Fixed Income Clearing Corporation ("FICC") filed with the Securities and Exchange Commission ("Commission") proposed rule change SR-FICC-2003-08 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").<sup>1</sup> Notice of the proposal was published in the **Federal Register** on January 28, 2004.<sup>2</sup> No comment letters were received. For the reasons discussed below, the Commission is approving the proposed rule change.

of care and limiting MBSD's liability to its participants does not limit the standard of care required of MBSD by Rule 17f-4 of the Investment Company Act of 1940 and the Division of Investment Management's no-action letter to FICC deeming MBSD to be an eligible fund custodian under Rule 17f-4. Rule 17f-4 and the Division of Investment Management's no-action letter require MBSD to exercise, at a minimum, due care in accordance with reasonable commercial standards in discharging its duties as a securities intermediary. Fixed Income Clearing Corporation (March 13, 2003).

A negligence standard of care continues to be required for custodial clearing agency functions.

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

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

<sup>2</sup> Securities Exchange Act Release No. 49113 (January 22, 2004), 69 FR 4193.

#### II. Description

FICC is adding adjustable-rate mortgage pass-through securities ("ARMS")<sup>3</sup> to the GCF Repo service.<sup>4</sup> The Government Securities Division ("GSD") of FICC currently accepts Fannie Mae ("FNMA"), Freddie Mac ("FHLMC"), and Ginnie Mae ("GNMA") fixed-rate mortgage pass-through securities ("FRMs") as repurchase agreement collateral in its GCF Repo service. The GSD is adding ARMS to the GCF Repo service and amending the GSD Rules to include the appropriate schedules of margin factors, offset classes, and disallowances as they pertain to ARMS.<sup>5</sup>

The GSD believes that ARMS make a logical addition to the categories of securities currently processed in the GCF Repo service for several reasons. ARMS are generally less risky to FICC and investors than FRMs due to their rate reset feature and faster prepayment rates. Both of these factors contribute to shorter effective duration and price fluctuations that results in lower margin factors as compared to FRMs. In addition, the correlation factors between ARMS and Treasuries are generally higher than those between FRMs and Treasuries because the adjustable rate mortgage pass-through securities reflect more of the current rate conditions than the fixed rate mortgage pass-through securities. Thus, the disallowance factors of ARMS versus Treasuries are smaller than those of FRMs versus Treasuries.

#### III. Discussion

Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions.<sup>6</sup> The Commission finds that FICC's proposed rule change is consistent with this requirement because it will promote the prompt and accurate clearance and settlement of securities transactions by enabling the GSD to provide the benefits of its netting, risk management, and

<sup>3</sup> ARMS are mortgage loans in which the contract rates are reset periodically at a predetermined spread (or margin) over a specified reference index (such as the one-year Constance Maturity Treasury or 6 month LIBOR).

<sup>4</sup> The GSD's GCF Repo service enables dealer members to freely and actively transact GCF Repos throughout the day without requiring intraday, trade-for-trade settlement on a delivery-versus-payment basis.

<sup>5</sup> The GSD is also proposing to make technical corrections to the relevant schedules to remove references to "GSCC" or to replace them with references to the Government Securities Division as appropriate.

<sup>6</sup> 15 U.S.C. 78q-1(b)(3)(F).

settlement services to an expanded pool of securities for its GCF Repo service.

#### IV. Conclusion

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

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act, that the proposed rule change (File No. SR-FICC-2003-08) be and hereby is approved.

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

Jill M. Peterson,

Assistant Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49374; File No. SR-NYSE-2004-10]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Minimum Price Variation

March 8, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 19, 2004, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the NYSE. The NYSE filed the proposal pursuant to section 19(b)(3)(A) under the Act,<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission.<sup>5</sup> The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The NYSE proposes to amend NYSE Rule 62, "Variations," to establish a minimum price variation of ten cents for equity securities trading on the NYSE at a price of \$100,000 or higher. The text of the proposed rule change appears below; additions are *italicized*.

##### Variations

**Rule 62** Bids or offers in securities admitted to trading on the Exchange may be made in such variations as the Exchange shall from time to time determine and make known to its membership.

##### Supplementary Material:

.10 Notwithstanding the provision for changing the minimum price variation in Rule 62, above, with respect to equity securities trading on the Exchange in decimal price variations pursuant to the phase-in of decimal pricing under the "Decimal Implementation Plan for the Equities and Options Markets," filed with the Securities and Exchange Commission on July 24, 2000, the minimum price variation shall be one cent (0.01).

.20 *With respect to equity securities trading on the Exchange at a price of \$100,000 or greater, the minimum price variation shall be ten cents (\$.10).*

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

In its filing with the Commission, the NYSE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NYSE has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

###### 1. Purpose

Trading in decimals began on the NYSE on August 28, 2000. At that time, the Exchange amended NYSE Rule 62 to provide that bids and offers in securities traded on the NYSE will be at a minimum price variation set by the NYSE. At the initiation of decimal trading, the NYSE announced that the minimum price variation for all stocks trading on the Exchange would be one cent (\$.01).

Currently, the Exchange's trading system technology does not support a minimum price variation of \$.01 for stock prices above \$99,999.99. Because one security listed on the Exchange currently is trading near this level, the Exchange proposes to amend NYSE Rule 62 to provide that the minimum price variation for stocks trading at a price of \$100,000 or greater will be ten cents (to be shown as .1). The proposed change reflects the unique technological circumstances relating to trading at that price level. The Exchange does not believe that requiring a minimum variation of ten cents will impose any burden on investors trading in securities priced at \$100,000 or greater.

###### 2. Statutory Basis

According to the NYSE, the basis under the Act for the proposal is the requirement under Section 6(b)(5) of the Act<sup>6</sup> that a national securities exchange have rules that are designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

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

The NYSE does not believe that the proposed rule change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

The NYSE has neither solicited nor received written comments on the proposed rule change.

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

The NYSE has filed the proposed rule change pursuant to section 19(b)(3)(A) of the Act<sup>7</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>8</sup> Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and

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

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

<sup>2</sup> 17 CFR 240.19b-4.

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

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

<sup>5</sup> The NYSE has asked the Commission to waive both the five-day pre-filing notice requirement and the 30-day operative delay. See Rule 19b-4(f)(6)(iii), 17 CFR 240.19b-4(f)(6)(iii).

<sup>6</sup> 15 U.S.C. 78f(b)(5).

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>8</sup> 17 CFR 240.19b-4(f)(6).