April 18, 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, as Modified by Partial Amendment No. 1, To Modify the GSD Rules To Facilitate Access to Clearance and Settlement Services of All Eligible Secondary Market Transactions in U.S. Treasury Securities" [Release No. 34-99817; File No. SR-FICC-2024-005]; "Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Proposed Rule Change To Modify the GSD Rules (i) Regarding the Separate Calculation, Collection and Holding of Margin for Proprietary Transactions and That for Indirect Participant Transactions, and (ii) To Address the Conditions of Note H to Rule 15c3-3a" [Release No. 34-99844; File No. SR-FICC-20240007]; and "Notice of Filing and Extension of Review Period of Advance Notice To Modify the GSD Rules (i) Regarding the Separate Calculation, Collection and Holding of Margin for Proprietary Transactions and That for Indirect Participant Transactions, and (ii) To Address the Conditions of Note H to Rule 15c3-3a" [Release No. 34-99845; File No. SR-FICC-2024-802]

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 (the "**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 (the "**FICC Rules**") to (a) facilitate access to clearance and settlement services of all eligible secondary market

[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, D.C. 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 U.S. Commodity Futures Trading Commission as futures commission merchants, the majority of which are also registered with the SEC as broker-dealers.

transactions in U.S. Treasury securities (the "**Access Proposal**");[2] and (b) provide for the separate calculation, collection, and holding of margin supporting proprietary transactions by a FICC Netting Member[3] or that a Netting Member submits on behalf of indirect participants (the "**Segregation Proposal**,"[4] and together with the Access Proposal, the "**FICC Proposals**").[5] FICC has issued the FICC Proposals in connection with the SEC's adoption of clearing agency standards requiring clearing agency rules for the clearing of certain cash and all repurchase and reverse repurchase transactions (with limited exceptions) in U.S. Treasury securities (the "**Clearing Mandate**").[6] FIA commented on the SEC's proposed clearing agency standards.[7] The SEC adopted these standards in December 2023. We urge the Commission and FICC to consider the challenges with the FICC Proposals for futures commission merchants ("**FCMs**") and other market participants in the futures industry and to work with FCMs to revise the FICC Proposals and further update the FICC Rules as recommended below. In particular, FIA strongly encourages that FICC continue to provide FCMs relief, and that the Commission provide any necessary relief, from the

[2] Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Proposed Rule Change, as Modified by Partial Amendment No. 1, To Modify the GSD Rules To Facilitate Access to Clearance and Settlement Services of All Eligible Secondary Market Transactions in U.S. Treasury Securities, 89 Fed. Reg. 21,362 (Mar. 27, 2024).

[3] The term "Netting Member" herein shall have the same meaning as provided in the GSD Rules. *See* Fixed Income Clearing Corporation Government Securities Division Rulebook (Dec. 4, 2023), https://www.dtcc.com/~/media/Files/Downloads/legal/rules/ficc_gov_rules.pdf. Where capitalized terms are used herein but not defined, such terms shall have the meaning ascribed to them in the Rules or FICC Proposals.

[4] Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing and Extension of Review Period of Advance Notice To Modify the GSD Rules (i) Regarding the Separate Calculation, Collection and Holding of Margin for Proprietary Transactions and That for Indirect Participant Transactions, and (ii) To Address the Conditions of Note H to Rule 15c3-3a, 89 Fed. Reg. 21,586 (Mar. 28, 2024).

[5] FIA understands that FICC will propose additional rules with respect to the Clearing Mandate and intends to publish guidance on the FICC Proposals. As FIA's understanding of FICC's implementation of the Clearing Mandate evolves based on new information, FIA may need to supplement its comments herein.

[6] 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 (Jan. 16, 2024). The FICC Proposals provide that the "proposed rule changes are primarily designed to ensure that FICC has appropriate [(a)] rules regarding the separate and independent calculation, collection, and holding of margin for proprietary transactions and that for indirect participant transactions" and (b) "means to facilitate access to clearance and settlement services of all eligible secondary market transactions in U.S. Treasury securities", each "in accordance with the requirements of Rule 17Ad-22(e)(6)(i) under the [Securities Exchange Act of 1934]." *See* Segregation Proposal, *supra* note 4 at 21,587, and Access Proposal, *supra* note 2, at 21,363.

[7] *See* Futures Industry Association, Comment Letter on 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 (Dec. 23, 2022), https://www.fia.org/sites/default/files/2023-01/Standards%20for%20Covered%20Clearing%20Agencies%20for%20US%20Treasury%20Securities.PDF [hereinafter, "**FIA Comment Letter**"].

clearing requirement until FCMs obtain regulatory relief from the U.S. Commodity Futures Trading Commission (the "**CFTC**") with respect to CFTC Regulation 1.25.[8]

I. Importance of FCMs in Derivatives and U.S. Treasury Markets

As intermediaries between futures and cleared swaps market participants and the exchanges and clearing organizations through which transactions are executed and cleared, FCMs receive, and are required to manage the risks of holding, a significant amount of customer funds and securities. To provide the SEC and FICC with context, the top 25 FCMs held nearly $200 billion in customer segregated accounts as of March 15, 2024.[9] The daily average amount of customer fund investments in U.S. Treasury securities and in reverse repurchase agreements across the 25 largest FCMs since June 15, 2023 is ***nearly $100 billion.***[10]

The Commodity Exchange Act (the "**Act**") and the CFTC's regulations establish a comprehensive customer protection program that requires FCMs to hold customer assets in customer segregated accounts established pursuant to Sections 4d(a) and 4d(f) of the Act and related regulations.[11] Customer assets that an FCM uses to secure foreign futures and options offered by a foreign board of trade are subject to a similar customer protection program, tailored to take into account the fact that customer assets are deposited outside the U.S. as necessary.[12] Consistent with all these regulations, an FCM necessarily holds customer funds by account class: (1) futures customer funds; (2) cleared swaps customer collateral; and (3) the foreign futures secured amount.[13]

The CFTC allows FCMs to invest customer funds in specific types of instruments pursuant to Regulation 1.25, including the purchase, sale, and repurchase and reverse repurchase of U.S. Treasury securities ("**repos**"). Customer funds can only be invested with certain approved

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[8] 17 C.F.R. § 1.25. CFTC Regulation 1.25 allows FCMs to invest customer funds with the objectives of preserving principal and maintaining liquidity. Thus, FCMs are limited in making investments using customer funds to specified instruments, including U.S. Treasury securities, U.S. agency obligations, interests in money market mutual funds, municipal securities, and certificates of deposit. 17 C.F.R. § 1.25(a)(1).

[9] The exact figure, based on data FCMs are required to report pursuant to CFTC rules and made publicly available on the National Futures Association's BASIC website, is $194,201,975,160.52.

[10] Specifically, from June 15, 2023 to March 15, 2024, the daily average of customer fund investments in outright purchases and sales of U.S. Treasury securities across the largest 25 FCMs is $87,253,552,412.72 and in reverse repurchase agreements across the largest 25 FCMs is $10,330,994,029.98, for a total of $97,584,546,442.70. This figure was calculated using data FCMs are required to report pursuant to CFTC rules and made publicly available on the National Futures Association's BASIC website.

[11] 7 U.S.C. §§ 6d(a), (f); 17 C.F.R. §§ 1.20 and 22.2.

[12] 7 U.S.C. § 6d(b); 17 C.F.R. § 30.7.

[13] *See* 17 C.F.R. §§ 1.20, 22.2, 30.7.

counterparties listed in Regulation 1.25.[14] The current list of approved counterparties does not include clearing agencies such as FICC. An FCM may choose to invest customer collateral in U.S. Treasury securities to provide additional protection for customer funds and potentially to earn interest on such funds. Investments in U.S. Treasury securities are backed by the full faith and credit of the U.S. government and are held by a bank in a custodial capacity. Thus, unlike cash held on deposit, U.S. Treasury securities are not subject to the risk of a bank failure. Under CFTC rules, the interest earned on U.S. Treasury securities may be for the benefit of the customer, the FCM, or shared between them, but any losses are borne solely by the FCM.[15]

II. Overview of Comments

1. In light of the important role that FCMs play in the investment of sizable customer funds including in U.S. Treasury repos, it is critical that the FICC Proposals work with applicable CFTC regulations to allow FCMs to participate effectively and efficiently in clearing. Both the existing sponsored member clearing access model (the "**Sponsored Service**") and the proposed agent clearing access model (the "**Agent Clearing Service**") in the FICC Proposals, however, conflict with applicable CFTC regulations. Accordingly, FCMs intend to seek relief from the CFTC to: (i) allow FICC to be an acceptable counterparty under CFTC Regulation 1.25, (ii) confirm that FICC Rules comply with the delivery-versus-payment ("**DVP**") and payment-versus-delivery ("**PVD**") requirements under CFTC Regulation 1.25(d)(9), (iii) allow FCMs to post their own collateral as margin for repos entered into with customer funds, and (iv) provide any other relief that may be necessary. FIA requests that until that relief can be obtained, FICC continue to apply Section 3 of FICC Rule 11 and Section 2 of FICC Rule 18 (collectively, the "**Applicable Law Exclusion**") to FCMs (and requests that the SEC also provide any necessary relief). These rules provide that a Netting Member's Covered Affiliate need not submit a trade to FICC if the obligation to submit the trade would cause a violation of any applicable law, rule or regulation.[16] FICC Rules currently require Netting Members and their Covered Affiliates

[14] 17 C.F.R. § 1.25(d)(2) (limiting permissible counterparties to a bank as defined in section 3(a)(6) of the Securities Exchange Act of 1934, a domestic branch of a foreign bank insured by the Federal Deposit Insurance Corporation, a securities broker or dealer, or a government securities broker or government securities dealer registered with the SEC or which has filed notice pursuant to section 15C(a) of the Government Securities Act of 1986).

[15] *See* 17 C.F.R. § 1.29. CFTC Rule 1.29 provides that an FCM may retain "as its own any incremental income or interest income" resulting from the investment of customer funds; however, the FCM alone "shall bear sole responsibility for any losses resulting from the investment of customer funds in instruments described in § 1.25." *Id.*

[16] Section 3 of Rule 11 reads, in pertinent part, "Each Netting Member must also submit to the Corporation for netting and settlement pursuant to these Rules data on each trade (hereinafter an "Eligible Trade") executed by a Covered Affiliate that satisfies the following criteria: (i) the trade is eligible for netting pursuant to these Rules, and (ii) the trade is executed with another Netting Member or with a Covered Affiliate of another Netting Member. For purposes of this Section the term "executed" shall include trades that are cleared and guaranteed as to their settlement by the Covered Affiliate. The preceding paragraph shall not apply to: (i) a trade that is executed between a Member and its Affiliates or between Affiliates of the same Member (an "Affiliate Trade") . . . or (iii) a trade the submission of which to the Corporation would cause the Member to be in violation of any applicable law, rule or regulation." Section 2 of

(which includes FCMs) to clear with other direct participants. The Applicable Law Exclusion forms the basis under the FICC Rules for not mandating FCMs to clear through FICC cash and repo trades involving funds being invested under CFTC Regulation 1.25.

2. FIA requests that FICC work with FCMs and the CFTC to develop alternative CFTC-compliant access models that are analogous to, but more streamlined and fit for purpose for FCMs than, the proposed Agent Clearing Service. FCMs would thereby be able to access FICC without having to go through a third-party Agent Clearing Member or Sponsoring Member. One possible and ready alternative is for FICC to permit, and the CFTC to allow, FCMs that already have a FICC Netting Membership—either as an FCM direct participant in FICC or as a dually registered broker-dealer direct participant—to establish additional segregated accounts and Margin Portfolios under their direct membership to separately clear and net repos that are entered into with customer funds. Segregated accounts and Margin Portfolios would allow an FCM to continue entering into these transactions using its own FICC direct membership without the need to seek and enter into agreements for other FICC access methods, none of which provide the efficient access to clearing that FCMs need in light of the amount of customer funds they invest.

3. While FIA strongly supports an alternative method for FCMs to access FICC, we offer the following comments on the Agent Clearing and Sponsored Services mindful that FICC intends to move forward with development and refinement of these models:

   (a) It is important that, prior to launching the Agent Clearing Service, FICC confirm the accounting treatment of the Agent Clearing Service. Specifically, an Agent Clearing Member should be able to treat any repo it undertakes with a client and then submits for novation as being off-balance sheet. Otherwise, the Agent Clearing Service may be prohibitively expensive and capital-intensive for firms.

   (b) FICC should incorporate a rule describing how an Agent Clearing Member closes out a client's trades in the event of the client's default.

   (c) FICC should confirm that funds-only settlement amounts are settlement payments rather than margin.

Rule 18 reads, in pertinent part, "Each Netting Member must also submit to the Corporation for netting and settlement pursuant to these Rules data on each Repo Transaction (hereinafter, an "Eligible Repo Transaction") executed by a Covered Affiliate that satisfies the following criteria: (i) the Repo Transaction is eligible for netting pursuant to these Rules, and (ii) the Repo Transaction is executed with another Netting Member or with a Covered Affiliate of another Netting Member. For purposes of this Section, the term "executed" shall include Repo Transactions that are cleared and guaranteed as to their settlement by the Covered Affiliate. The preceding paragraph shall not apply to: (i) a Repo Transaction that is executed between a Member and its Affiliates or between Affiliates of the same Member (hereinafter, an "Affiliate Trade") . . . or (iii) a Repo Transaction the submission of which to the Corporation would cause the Member to be in violation of any applicable law, rule or regulation."

III. The FICC Rule Proposals Conflict with CFTC Regulatory Obligations Applicable to FCMs

A. FICC Should Confirm the Continued Applicability to FCMs of the Applicable Law Exclusion in the FICC Rules

FICC should confirm that the Applicable Law Exclusion will continue to apply to FCMs such that FCMs will not need to submit a trade to FICC until the CFTC approves FCMs' clearing U.S. Treasury securities through a clearing agency under CFTC regulations and FCMs are able to take the required steps to implement the approved model(s). Otherwise, FCMs would violate applicable law, rule or regulation in using either the existing Sponsored Service or the proposed Agent Clearing Service.[17]

The FICC Proposals are not consistent with a number of requirements imposed on FCMs by CFTC Regulation 1.25. When an FCM invests customer funds in repos collateralized by U.S. Treasury securities, an FCM must do so pursuant to CFTC Regulation 1.25(d). Under this regulation, an FCM may only enter into such agreements with "permitted counterparties", defined to include a bank as defined in section 3(a)(6) of the Securities Exchange Act of 1934, a domestic branch of a foreign bank insured by the Federal Deposit Insurance Corporation, a securities broker or dealer, or a government securities broker or government securities dealer registered with the SEC or that has filed notice pursuant to the Government Securities Act of 1986.[18] As a clearing agency, FICC does not qualify as a permissible counterparty under CFTC Regulation 1.25. Therefore, the existing Sponsored Service is not available to FCMs because FICC is the counterparty in that model.[19]

Further, despite the SEC's statement in the Clearing Mandate that an FCM should be able to be a client of an Agent Clearing Member, in such circumstance, it is unclear whether the Agent Clearing Service would satisfy current CFTC Regulation 1.25 without CFTC relief.[20] As we understand the proposal, a client of the Agent Clearing Member is not intended to be the

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[17] As described below, FCMs believe that there may be a simpler way to access FICC for clearing using their existing broker-dealer direct participant membership or refining the existing FCM direct membership and would like time to discuss and develop such a model with FICC.

[18] 17 C.F.R. § 1.25(d)(2).

[19] *Id.*

[20] *See* Standards for Covered Clearing Agencies for U.S. Treasury Securities and Application of the Broker-Dealer Customer Protection Rule With Respect to U.S. Treasury Securities, 89 Fed. Reg. 2,714, 2,735 (Jan. 16, 2024) ("However, the requirement to clear eligible secondary market transactions does not require that the FCM use a particular type of model that would make the FCM a counterparty to a [covered clearing agency]. The FCM could access central clearing through an agent clearing model like FICC's Prime Broker or Correspondent Clearing models, in which it would essentially 'give up' its transaction to a direct participant for submission without becoming a counterparty to the [covered clearing agency], which should be consistent with the FCM's obligations under Rule 1.25(d)(2). Therefore, this requirement to clear eligible secondary market transactions does not obligate the FCM to use a model that would necessarily result in a transaction with a clearing agency as the counterparty to the FCM.").

"counterparty" to either the Agent Clearing Member (insofar as the two do not face one another as principals) or to FICC (in that the two are not in contractual privity) under the client's transactions. Rather, due to the unique agency relationship between the client and Agent Clearing Member, the client is more accurately viewed as a beneficial owner of the transactions cleared by the Agent Clearing Member on the client's behalf. Such an arrangement is not contemplated by, and does not fit squarely within, CFTC Regulation 1.25, and as a matter of reasonable caution FCMs need confirmation that its requirements will be satisfied if they elect to access FICC as clients of Agent Clearing Members.

In addition to the counterparty issue, FCMs must comply with other CFTC requirements. For example, an FCM must enter into reverse repurchase agreements on a DVP basis[21] and repurchase agreements on a PVD basis.[22] The CFTC also requires a repo agreement to make clear that, in the event of the FCM's bankruptcy, (1) any securities purchased with customer funds under such agreement may be immediately transferred; and (2) the counterparty has no right to compel liquidation of securities subject to such agreement or to make a priority claim for the difference between current market value of the securities and the price agreed upon for the resale of the securities to the counterparty if the former exceeds the latter (the "**FCM Bankruptcy Confirmation**").[23] Moreover, the CFTC explicitly prohibits an FCM from entering into repos with an affiliate.[24]

The CFTC would need to confirm that the process for settlement of the "off-leg" (described below), and in particular the Agent Clearing Member's and Sponsoring Member's processing agent role, is consistent with the CFTC Regulation 1.25 DVP and PVD requirements. Since FICC will require initial margin for trades, FCMs will want to discuss with the CFTC how that initial margin will be sourced. Finally, the FICC Rules would need to include the FCM Bankruptcy Confirmation.

Accordingly, FIA requests that FICC preserve the Applicable Law Exclusion long enough for FCMs to obtain CFTC relief, for FCMs to enter into appropriate relationships with third parties to access the Sponsored or Agent Clearing Services (if that proves necessary) and to seek a direct access model through their existing broker-dealer direct participant or an FCM netting membership. To the extent that the SEC believes that SEC-level relief is also necessary, FIA requests that it provide this relief.

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[21] 17 C.F.R. § 1.25(d)(9). The regulation provides that a transfer "is not recognized as accomplished until the funds and/or securities are actually received by the custodian of the [FCM's] customer funds or securities purchased on behalf of customers." *Id.*

[22] 17 C.F.R. § 1.25(d)(9).

[23] 17 C.F.R. § 1.25(d)(13).

[24] 17 C.F.R. § 1.25(d)(3).

B. The FICC Proposals Must Be Amended to Provide CFTC-Compliant Customer Segregated Sub-Accounts for FCMs

As detailed in Section I, FCMs must hold customer assets in customer segregated accounts established pursuant to Sections 4d(a) and 4d(f) of the Act and related regulations.[25] FCMs, therefore, hold customer funds by account class: (1) futures customer funds; (2) cleared swaps customer collateral; and (3) the foreign futures secured amount.[26] FICC Rules and the FICC Proposals do not explicitly provide for the segregation that FCMs need to comply with CFTC requirements.

FIA urges FICC to allow FICC members to maintain sub-accounts (whether in the form of Margin Portfolios or otherwise) for futures customer funds, cleared swaps customer funds, and foreign futures customer funds that comply with CFTC requirements. Each such sub-account would need to be netted and margined separately from each other such sub-account and separate from the FCM's proprietary trades to achieve the requisite CFTC segregation. Without changes to the account structure, FCMs will not be able to access FICC under any new or legacy access model.

C. Alternative Access Methods Should Be Explored

Many FCMs are dually registered as broker-dealers who are themselves FICC Netting Members or can themselves become Netting Members in their own right.[27] FCMs are thus in a unique position relative to other market participants that will need to access FICC to comply with the clearing mandate. Owing to this status, FIA believes that FCMs would benefit from a simpler alternative access model analogous to the Agent Clearing Service.

We see a number of impediments to FCMs being able to efficiently use the Agent Clearing and Sponsored Services. Even if the CFTC approves the use of such models, it is not clear to us today how FCMs will be able to participate. For instance, FCMs would need to enter into these arrangements with third parties. Moreover, FCMs would need to enter into these arrangements for each customer account class mandated by CFTC regulations. Using a third party to clear through FICC would also likely require FCMs to share proprietary information with their competitors. In short, we believe the proposed access models will impose unnecessary costs and onerous operational burdens on FCMs.

FIA respectfully submits that there may be an easier path: allowing an FCM to use its Netting Membership (through its broker-dealer or its own FCM membership) with separate netting by establishing subaccounts and separate Margin Portfolios.

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[25] 7 U.S.C. §§ 6d(a), (f); 17 C.F.R. §§ 1.20 and 22.2.

[26] *See* 17 C.F.R. §§ 1.20, 22.2, 30.7.

[27] FIA understands that there is also an FCM that is not dually registered as a broker-dealer that is a Netting Member of FICC.

(1) FCM Access Through Existing Broker-Dealer Netting Membership

FIA recommends that FICC allow FCMs that are dually registered as FCM/broker-dealers to access FICC through their existing broker-dealer netting membership. To demonstrate how we envision FCMs accessing FICC under our suggested framework, below is a description of a reverse repurchase transaction involving U.S. Treasury securities using customer funds, for which there will be an "on leg" and an "off leg".

The on leg is typically not done on FICC. Rather, an FCM will receive U.S. Treasury securities in a customer segregated account compliant with CFTC's requirements. Consistent with the CFTC requirement that an FCM enter into reverse repurchase agreements on a DVP basis, the FCM will transfer cash to the counterparty's account.[28]

The FCM will novate to FICC the unwind of the reverse repurchase agreement involving U.S. Treasury securities using customer funds (the off leg). The FCM will need an arrangement with a Sponsoring Member or Agent Clearing Member unless it can use its broker-dealer's membership to access FICC. If the FCM were to use its own broker-dealer membership to access FICC, these movements of the off-leg, which would otherwise be netted against the broker-dealer's own trades, would need to be separated to ensure that the FCM is receiving and using customer funds consistent with CFTC Regulation 1.25. Access through direct membership would work, however, if FICC provides separate segregation by CFTC-recognized account classes (such as in specially designated Margin Portfolio accounts) for the trades entered into pursuant to CFTC Regulation 1.25.[29]

Thus, we believe the most efficient way for a dually registered FCM/broker-dealer to clear repos using customer funds is through its broker-dealer membership, with separate sub-accounts for each customer class. As noted above, FICC will need to establish sub-account categories consistent with CFTC customer account classes and applicable requirements. We believe this approach would be more efficient for FICC, too, because it likely involves fewer operational challenges than the existing and proposed access models. FIA respectfully requests FICC to allow a dually registered FCM/broker-dealer to utilize its existing netting membership with appropriate sub-accounts.

(2) FCM Access Through an FCM Netting Membership

Another more efficient way for an FCM to access FICC may be through its own membership (particularly for an FCM that is not registered as a broker-dealer to access FICC). We ask FICC to consider allowing FCMs to maintain netting memberships even where the FCM is

[28] 17 C.F.R. § 1.25(d)(9). The regulation provides that a transfer "is not recognized as accomplished until the funds and/or securities are actually received by the custodian of the [FCM's] customer funds or securities purchased on behalf of customers." *Id.*

[29] The FICC rules in fact currently have this architecture for separate Margin Portfolios.

dually registered as a broker-dealer, despite sharing the same legal entity identifier and legal name as its broker-dealer member. Under an FCM's own membership, the FCM could establish customer-designated separate Margin Portfolio accounts for each account sub-class and encounter fewer operational challenges.

IV. The Accounting Treatment of the Agent Clearing Service Must be Clarified

FIA urges FICC to obtain accounting confirmation that a U.S. GAAP reporting entity acting as an Agent Clearing Member would not be required to record the transactions it clears for its Executing Firm Customers on its balance sheet. While FIA members are continuing to analyze both the capital and accounting treatment of FCM participation in the proposed models, it is critical that they be eligible for off-balance sheet treatment. Settling the capital and accounting treatment is of paramount importance before FCMs are even able to predict the economic impact of model participation. FIA would be pleased to work with FICC to assess the treatment of each service under applicable accounting rules.

V. The Rules Should Include Provisions Addressing Treatment of the Open Positions of a Sponsored Member and an Executing Firm Customer if it Defaults or if FICC Ceases to Act for or Suspends its Sponsoring Member or Agent Clearing Member

FICC should incorporate a rule under the Agent Clearing Service that authorizes an Agent Clearing Member, in connection with liquidating an Executing Firm Customer's open positions upon its default, to cause the Executing Firm Customer's open positions to be transferred from the applicable Agent Clearing Member Omnibus Account and/or transfer to the Agent Clearing Member Omnibus Account transactions that offset or flatten the Executing Firm Customer's open positions.

The FICC Rules should also be more transparent as to the procedures for handling the open positions of Executing Firm Customers or Sponsored Members upon FICC's ceasing to act for or suspending their Sponsoring Member or Agent Clearing Member. Section 14 of FICC's Rule 3A provides that if FICC ceases to act or suspends a Sponsoring Member, FICC "in its sole discretion, shall determine whether to close-out the affected Sponsored Member Trades and/or permit the Sponsored Members to complete their settlement."[30] The FICC Proposals do not contain anything analogous for trades done for Executing Firm Customers, and FICC should confirm whether it plans to close out those trades when it closes out the Agent Clearing Member's own proprietary trades. The circumstances under which FICC may cease to act or suspend a Member are broad, including insolvency of the Member and when FICC's board "has reasonable grounds to believe that a member is in or is approaching significant financial or operational difficulty or otherwise will be unable to meet its obligations to [FICC]."[31] As a result of this breadth, FICC should be more transparent as to how it will undertake close-out where client trades are involved to ensure

[30] *See* FICC Rules, Section 14 of Rule 3A.

[31] *See id*, Section 1(e) of Rule 21.

that calculations are done in a way that upholds market stabilization. FICC Rule 22A contains close-out procedures for when FICC ceases to act for a Member but that rule does not cover how trades of Sponsored Members or Executing Firm Customers will be liquidated or how FICC will treat any related done-with trades of the Sponsoring Member or Agent Clearing Member. In addition, FICC should consider allowing portability of customer term trades in a cease to act, suspension or other context (short of insolvency).

VI. Funds-Only Settlement Amounts are Settlement Payments Rather than Margin

Netting Members wish to confirm that funds-only settlement amounts will be treated as settlement payments rather than cash margin. FICC currently collects settlement payments in the form of cash (referred to as "funds-only settlement amounts") twice per day.[32] FICC reprices transactions as a result. These funds-only settlement amounts are paid by customers to their Direct Participant who sends them to FICC, or the Direct Participant fronts the payment and is reimbursed by the customer. FICC itself, in the FICC Proposals, does not treat funds-only settlement amounts as customer-delivered margin potentially subject to its segregation rules.[33]

Market participants need certainty that funds-only settlement amounts are outside the scope of the margin segregation rule. Therefore, FIA requests that FICC confirm that funds-only settlement amounts are not considered margin and not subject to segregation requirements under the FICC Proposals.

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As explained in detail above, the CFTC has a long-established customer protection regime and FCMs must use customer funds consistent with this regime. Because both the Sponsored Service and Agent Clearing Service conflict with the CFTC regulatory obligations applicable to FCMs, the FIA respectfully requests that if the SEC chooses to adopt the FICC Proposals, it require FICC to preserve the Applicable Law Exclusions for FCMs while appropriate relief is sought from the CFTC to recognize FICC as an acceptable counterparty and otherwise align the FICC Proposals with CFTC requirements. Without this relief, FCMs will be placed in an impossible position—risking noncompliance with one governmental authority to comply with another. FIA further urges FICC to provide more workable access models for FCMs, which, we submit, need not be substantial departures from those proposed. Finally, with respect to the Agent Clearing Service, FIA requests clarification of the accounting treatment under the Agent Clearing Service,

[32] *See* FICC Government Securities Division Rulebook, Rule 1 (defining "funds-only settlement amount"); FICC Rule 13 (describing the calculation and collection of the funds-only settlement amount).

[33] *See* Securities Exchange Act Release No. 34-99844, File No. SR-FICC-2024-007, Exhibit 5, at 133 (Mar. 22, 2024) (proposed Rule 4, describing the calculation and collection of segregated margin, which does not include funds-only settlement amounts).

confirmation that an Agent Clearing Member may close out a defaulting customer's positions and confirmation that funds-only settlement amounts are not subject to segregation.

FIA appreciates the opportunity to provide comments to the Commission on the FICC Proposals. 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,

Walt L. Lukken
President and Chief Executive Officer