The subject matter of the Closed Meeting scheduled for May 15, 2008 will be:

Formal orders of investigation;

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings of an enforcement nature;

Resolution of litigation claims; and an

Adjudicatory matter.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 551–5400.

Dated: May 8, 2008.

Nancy M. Morris,

Secretary.

[FR Doc. E8–10721 Filed 5–13–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57803; File No. SR–NASD–2005–114]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc. (n/k/a Financial Industry Regulatory Authority, Inc.); Order Approving Proposed Rule Change and Amendment Nos. 1, 2, 3, and 4 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 5 Relating to the Regulation of Compensation, Fees and Expenses in Public Offerings of Real Estate Investment Trusts and Direct Participation Programs

May 8, 2008.

I. Introduction

On September 28, 2005, the National Association of Securities Dealers, Inc. (''NASD'') [1] filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] proposed amendments to NASD Rule 2810. On June 12, 2006, NASD filed Amendment No. 1 to the proposed rule change.[4] The proposed rule change was published for comment in the **Federal Register** on July 17, 2006 (''Original Proposal''),[5] and the Commission received six comments.[6]

On April 16, 2007, NASD submitted Amendment No. 2 to the proposed rule change, and on November 9, 2007 and January 2, 2008, FINRA submitted Amendment No. 3 and No. 4, respectively, to the proposed rule change.[7] The Commission published the proposed rule change, as amended, for comment in the **Federal Register** on January 31, 2008 (''Revised Proposal''),[8] and the Commission received six comments, which are discussed below in Section III.[9] On April 11, 2008, FINRA submitted Amendment No. 5 to the proposed rule change.[10]

This notice and order solicits comment from interested persons on Amendment No. 5 and approves the proposed rule change, as amended, on an accelerated basis. The text of the proposed rule change is available at *http://www.finra.org*, the principal offices of FINRA, and the Commission's Public Reference Room.

II. Description of the Proposed Rule Change

As discussed in more detail in the Original Proposal and Revised Proposal, FINRA is proposing to amend NASD Rule 2810 to address the regulation of compensation, fees and expenses in public offerings of direct participation programs (as defined in NASD Rule 2810(a)(4)) (''DPPs'') and unlisted real estate investment trusts (as defined in NASD Rule 2340(d)(4)) (''REITs'') (collectively ''Investment Programs'').[11] Specifically, the proposed rule change addresses: (1) Compensation limitations and the use and allocation of offering proceeds; (2) disclosure regarding the liquidity of prior programs offered by the same sponsor; (3) sales loads on reinvested dividends; and (4) non-cash compensation provisions regarding the appropriate location for training and education meetings. The proposed rule change also adds REITs to provisions that already apply to DPPs, but does not make any substantive changes to these sections.[12]

III. Summary of Comments Received and FINRA Response

In Amendment No. 5, FINRA responded to comments on the Revised Proposal and proposed additional amendments to the proposed rule change.

A. Registered Representatives Engaged in de minimis and Incidental Sales Activities

The proposed amendment to Rule 2810(b)(4)(C)(ii)(c) would exclude from the underwriting compensation limit [13] payments to registered representatives, including dual employees, engaged in the solicitation, marketing, distribution or sales of the offering whose functions in connection with that offering are solely and exclusively clerical and ministerial. The IPA suggested that this should be revised to permit a *de minimis* exception for payments to registered representatives whose functions are predominantly—i.e., at least 95 percent of the employee's time—clerical or ministerial, but who

[1] On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. *See* Securities Exchange Act Release No. 56146 (July 26, 2007), 72 FR 42190 (Aug. 1, 2007).

[2] 15 U.S.C. 78s(b)(1).

[3] 17 CFR 240.19b–4.

[4] Amendment No. 1 replaced and superseded the original rule filing.

[5] *See* Securities Exchange Act Release No. 54118 (July 10, 2006), 71 FR 40569 (July 17, 2006) (SR–NASD–2005–114).

[6] *See* letters from the Committee on Federal Regulation of Securities of the American Bar Association (Keith F. Higgins), dated Aug. 22, 2006; North American Securities Administrators Association (Patricia D. Struck), dated Aug. 11, 2006; Dominion Investor Services, Inc. (Kevin P. Takacs), dated Aug. 7, 2006; Investment Program Association (Rosemarie Thurston), dated Aug. 7, 2006; the Securities Division of Office of the Secretary of the Commonwealth of Massachusetts (Bryan Lantagne), dated Aug. 4, 2006; and Cambridge Legacy Group (Frank Akridge, Jr.), dated Aug. 4, 2006.

[7] Each amendment replaced and superseded the earlier amendment. Amendment No. 4 also responded to comments on the Original Proposal.

[8] *See* Securities Exchange Act Release No. 57199 (Jan. 25, 2008), 73 FR 5885 (Jan. 31, 2008) (SR–NASD–2005–114).

[9] *See* letters from R.J. O'Brien Fund Management, LLC (Annette A. Cazenave), dated Apr. 28, 2008 (''R.J. O'Brien''); Michael V. Scillia, ASG Securities, Inc., dated Feb. 24, 2008 (''Scillia''); Committee on Federal Regulation of Securities of the American Bar Association (Keith F. Higgins), dated Feb. 22, 2006 (''ABA Committee''); Snyder Kearney LLC, dated Feb. 21, 2008 (''Snyder''); David Lerner, David Lerner Associates, Inc., dated Feb. 21, 2008 (''Lerner''); and Investment Program Association (Jack L. Hollander), dated Feb. 21, 2006 (''IPA'').

[10] Amendment No. 5 responded to comments on the Revised Proposal and proposed several amendments to the proposed rule change.

[11] The DPPs and REITs that comprise Investment Programs typically are structured so that several affiliated entities make up the program. The affiliated entities include the sponsor, the trust or limited partnership, and a broker-dealer.

[12] *See* proposed amendments to Rule 2810(b)(3)(A), Rule 2810(b)(4)(A), Rule 2810(b)(4)(B)(v), Rules 2810(b)(4)(D)–(G) and Rule 2810(b)(5). The proposed amendment to Rule 2810(b)(4)(G) also corrects a typographical error by citing ''subparagraph (C),'' instead of ''subparagraph (E)'' under the existing rule.

[13] The underwriting compensation payable to underwriters, broker-dealers, or affiliates may not exceed ten percent of the gross proceeds of the offering, regardless of the source from which the compensation is derived. *See* current Rule 2810(b)(4)(B)(i) and Notice to Members 82–51. As explained in the Revised Proposal, the ten percent figure currently is FINRA policy. The proposed amendment to Rule 2810(b)(4)(B)(ii) would expressly state that all items of compensation shall not exceed ten percent of the gross proceeds of the offering.

on rare occasions may go beyond performing solely clerical and ministerial functions, such as answering questions.

FINRA stated that the proposed amendment to Rule 2810(b)(4)(C)(ii)(c)(2) was intended to achieve clarity and ease of administration by excluding only those registered representatives whose functions are ''solely and exclusively clerical and ministerial.'' In response to comments, FINRA has amended proposed Rule 2810(b)(4)(C)(ii)(c)(3) to include registered representatives engaged in sales activities provided those activities are ''*de minimis* and incidental to his or her clerical or ministerial functions.'' However, FINRA stated that it did not intend to adopt a particular metric with respect to this exception, such as percentage of time spent, as it could serve as a tool to evade the purpose and spirit of the rule. FINRA stated that it expected the ''*de minimis* and incidental'' exception to be a very narrow one for registered persons whose sales activities are truly incidental to their job functions. FINRA noted that the exception in the proposed amendment to Rule 2810(b)(4)(D) for firms with ''ten or fewer registered representatives'' engaged in wholesaling is intended to apply to those firms that are most likely to have a need for personnel performing multiple functions.

B. Calculating Items of Underwriting Compensation

Two commenters stated that proposed amendments to Rules 2810(b)(4)(C)(ii)(a)–(c) could result in double counting certain items for purposes of the underwriting compensation limit.[14] For example, these commenters stated that payments received by a member that would be counted as underwriting compensation under the proposed amendment to Rule 2810(b)(4)(C)(ii)(a) would have to be counted again for purposes of the proposed amendments to Rules 2810(b)(4)(C)(ii)(b)–(c) when the member re-allows the payments to its registered representatives.

FINRA responded that it did not intend that items of compensation already required to be counted under proposed amendments to Rule 2810(b)(4)(C)(ii)(a) be double-counted for purposes of the underwriting compensation limit. In response to these comments, FINRA has revised the proposed amendments to Rules 2801(b)(4)(C)(ii)(b)–(c).[15]

C. Allocation of Compensation to Dual Employees in Connection With More Than One Offering

Two commenters addressed proposed guidance with respect to allocation of payments to dual employees for purposes of the underwriting compensation limit where the dual employees receive payments for services in connection with more than one offering.[16] Footnote 36 of the Revised Proposal provided guidance (''Guidance'')[17] that if a dual employee receives compensation for services provided in connection with more than one public offering, or for private placements in addition to offerings of Investment Programs, payments to such employees may be reasonably allocated between the offerings based on the time periods in which the employee was engaged in the offerings, if they are distinct, or based on the relative size of the offerings.

The ABA Committee and IPA sought clarification as to whether the Guidance would apply only to dual employees to whom the exceptions from the underwriting compensation set forth in the proposed amendment to Rule 2810(b)(4)(D) are available. FINRA responded that its Corporate Financing Department (the ''Department'') will allocate compensation among multiple offerings with regard to all relevant payments and expenses, not just those for dual employees.

The IPA also stated that the concepts addressed in the Guidance should be incorporated into the proposed amendments to Rule 2810 with general application to payments to dual employees among multiple offerings, not just the exceptions in Proposed Rule 2810(b)(4)(D). The ABA Committee suggested that the Guidance should allow the allocation of the salary of any registered representative.

FINRA responded that it will continue its longstanding practice, with respect to a registered representative receiving compensation for services provided in connection with more than one public offering, or for private placements in addition to offerings of Investment Programs, of allowing payments to such registered representatives to be allocated between the offerings on a reasonable basis taking into account relevant factors, including the time periods spent on particular offerings, the relative sizes of the offerings and the number of investors in each. FINRA noted that, in the course of its review of particular offerings, information and representations by members with respect to such factors will vary. As a result, FINRA determined not to codify these factors and their respective weights in the proposed rule change, but rather will continue its current review practices that permit reasonable basis allocations.

D. Analysis of Employee Compensation

1. Per Employee Analysis in All Investment Programs

The proposed amendment to Rule 2810(b)(4)(D) would have excepted from the underwriting compensation limit, subject to the Department's determination, some portion of the non-transaction-based payments to a registered representative dual employee of an Investment Program with ''fewer than ten people engaged in wholesaling.'' The ABA Committee suggested that the exception should instead be available to smaller members that have fewer than ten registered representatives engaged in wholesaling with respect to an Investment Program in order to avoid the inclusion of persons who are not registered in the calculation.[18]

The IPA also asked FINRA to clarify the proposed rule to provide that in determining whether there are fewer than ten people engaged in wholesaling, only those persons engaged in wholesaling for a particular Investment Program should be counted, rather than all registered representatives who are employed by a sponsor or affiliate and engaged in wholesaling some other product of the sponsor or affiliate.

The Revised Proposal explained that the Department would engage in the same detailed job function analysis with respect to certain compensation associated with smaller Investment Programs as it would with respect to certain compensation of the ten highest paid executives in any Investment Program. Accordingly, a member could provide detailed per-employee information to the Department from which the Department could conclude that certain salary and other non-

[14] ABA Committee and IPA.

[15] The ABA Committee also requested that the language in the proposed amendment to Rule 2810(b)(4)(B)(ii) be modified slightly to rearrange some commas and clarify that trail commissions are not paid with offering proceeds. FINRA has revised the text accordingly.

[16] ABA Committee and IPA.

[17] The Guidance appeared in the purpose section of the Revised Proposal and not the proposed rule text.

[18] The ABA Committee also stated that the rule should be amended to clarify that it applies to a dual employee of a ''member and the sponsor, issuer or other affiliate.''

transaction-based compensation provided to the employee could be allocated to issuer expenses.

In response to these comments, FINRA has amended the exception to clarify that for every program or REIT filed for review, the Department will engage in the detailed per-employee analysis. The proposed amendment to Rule 2810(b)(4)(D) would apply to ''ten or fewer registered representatives'' engaged in wholesaling if they are dual employees in a smaller Investment Program and to the ten highest paid executives in any Investment Program.[19] FINRA also clarified that the rule would only apply to ''ten or fewer registered representatives [of an Investment Program] engaged in wholesaling.'' FINRA also clarified that the rule applied to a dual employee of a ''member and the sponsor, issuer or other affiliate.'' [20]

The ABA Committee also suggested that the calculation of the number of persons engaged in wholesaling should only include those registered representatives directly contacting other members to solicit new selling agreements with respect to the specific Investment Program. FINRA disagreed. As discussed in the Revised Proposal, the Department expects to conduct accurate and efficient reviews of the individual's job functions to determine whether the exceptions in proposed amendment to Rule 2810(b)(4)(D) would be available. FINRA stated that it does not believe it is useful or appropriate to conduct a two-step analysis of each registered representative's functions (to analyze every registered representative's activities to determine whether ten or fewer were engaged in wholesaling with regard to a specific Investment Program, and then to analyze the job functions of up to ten registered representatives to determine what portion of payments to them should be included in the underwriting compensation calculation).

2. Top Ten Executives

The proposed amendment to Rule 2810(b)(4)(D) would except from the underwriting compensation limit, subject to the Department's determination, some portion of the non-transaction-based payments to a registered representative dual employee who is one of the top ten highest paid executives based on non-transaction-based compensation in any Investment Program. The ABA Committee sought clarification as to whether the executives to whom this exception would be available must be registered representative dual employees. As discussed above, FINRA has amended the exception to make this clarification.

Two commenters stated that the exception should not require that the dual employees must be executives or have executive titles.[21] Further, both commenters suggested that the top-ten calculation should be based on non-transaction-based compensation ''in connection with'' an Investment Program.[22]

FINRA responded that the term ''executive'' is not intended as a formal job designation or title, but rather as a characterization of the registered representative dual employee's role in the Investment Program. As explained in the Revised Proposal, the Department believes that it can identify and evaluate a small group of individuals performing executive job functions within an Investment Program. However, FINRA disagreed with the suggestion of amending the rule to base the top ten executive calculation on non-transaction-based compensation ''in connection with'' a particular Investment Program. As with firms with up to ten registered representatives engaged in wholesaling, FINRA does not believe it is useful or appropriate to conduct a two-step analysis for each executive (to determine the extent to which each executive's compensation varies and is attributable to particular programs in order to identify the relevant executives eligible for the exception, and then to determine what portion of payments to them should be included in the underwriting compensation calculation).

E. Issuer Expenses

1. Overhead Expenses

Both the ABA Committee and the IPA stated that the proposed amendment to Rule 2810(b)(4)(C)(i) should be revised to clarify that issuer expenses, not just overhead expenses, that are reimbursed or paid for with offering proceeds must be included for purposes of the cap on organization and offering expenses. FINRA has revised the proposed amendment to Rule 2810(b)(4)(C)(i) to make this clarification.

2. Services for the Issuer

The ABA Committee stated that the proposed amendment to Rule 2810(b)(4)(C)(i)(c) should clearly specify the scope of services provided by employees or agents of the sponsor or issuer that must be included for purposes of the cap on organization and offering expenses. When proceeds of an offering are used to pay issuer expenses, these payments or reimbursements must be identified in filings with the Department. FINRA responded that if the rule limited the scope of payments that could be made to employees or agents of the sponsor or issuer for performing services for the issuer to only those activities specifically described in the rule, some otherwise legitimate payments or reimbursements using offering proceeds would be prohibited. Accordingly, FINRA has not revised the proposed amendments to Rule 2810(b)(4)(C)(i)(c), other than to clarify that the proposed rule refers to services for the issuer.

F. Liquidity and Marketability Disclosure

The IPA expressed concern that the proposed amendments to Rule 2810(b)(3)(D) would impose upon members a burdensome due diligence review requirement with respect to the liquidity and marketability of an Investment Program. In its response, FINRA recognized the burdens associated with these requirements, but noted that the proposed amendment to Rule 2810(b)(3)(D) is intended to permit members to rely upon the liquidity and marketability information as provided to the member by the sponsor or general partner of an Investment Program, provided that the member does not know or have reason to know that the information is inaccurate. Accordingly, FINRA has not revised the proposed amendment to Rule 2810(b)(3)(D).

G. Reinvested Dividends

One commenter expressed concern regarding the prohibition set forth in the proposed amendment to Rule 2810(b)(4)(B)(vi) against sales loads on reinvested dividends for Investment Programs.[23] After considering the comment, FINRA determined to maintain the prohibition on sales loads on reinvested dividends. FINRA emphasized that commenters on the Original Proposal supported this

[19] The wholesaling exception discussed in the Revised Proposal would have been available to an Investment Program with ''fewer than ten people'' engaged in wholesaling. In response to comments, FINRA stated that allowing the exception for ''ten or fewer'' registered representatives rather than ''fewer than ten'' would be consistent with the goal of clarity and ease of administration.

[20] Telephone conversation among Gary Goldsholle, Vice President and Associate General Counsel, FINRA; Joseph Price, Vice President, Corporate Financing, FINRA; Adam Arkel, Assistant General Counsel, FINRA; Lourdes Gonzalez, Assistant Chief Counsel—Sales Practices, Commission; and Michael Hershaft, Special Counsel, Commission (May 7, 2008).

[21] ABA Committee and IPA.

[22] *Id.*

[23] Lerner.

amendment [24] and the amendment is intended to conform Rule 2810 to similar changes made to Rule 2830 with respect to sales loads on reinvested dividends for sales of mutual funds. Further, so as to avoid the indirect payment of sales loads on reinvested dividends for Investment Programs, FINRA has amended proposed Rule 2810(b)(4)(B)(ii) to clarify that the calculation of ''ten percent of the gross proceeds of the offering'' excludes securities purchased through the reinvestment of dividends.

H. Due Diligence Services

One commenter sought guidance as to what levels of detail and itemization, as required by the proposed amendment to Rule 2810(b)(4)(B)(vii), would be appropriate for an invoice prepared by a law firm conducting on behalf of a member due diligence services that are intended to be reimbursed as issuer expenses.[25] FINRA responded that industry best practices may be effective in establishing a threshold for itemization rather than additional rulemaking. The commenter also sought guidance as to whether it would be permissible for the issuer or sponsor to reimburse the law firm directly, so that the member need not go through the extra step of first itself paying the law firm and then seeking reimbursement from the issuer or sponsor.[26] FINRA responded that a law firm could not provide bona fide due diligence in an offering if its client was the issuer or sponsor rather than the broker-dealer. The method of reimbursement for due diligence services should be irrelevant so long as it does not undermine the law firm's duties to its client, the broker-dealer.[27]

[24] Massachusetts Securities Division and NASAA.

[25] Snyder.

[26] *Id.*

[27] FINRA also addressed two other comments. Scillia suggested that the five percent limitation on issuer expenses that currently exists in NASD Rule 2810 precludes offerings of smaller DPPs. FINRA disagreed with this comment. FINRA stated that the five percent limitation on issuer expenses pertains to the amount that may be used from offering proceeds. An issuer can spend additional funds from other sources. Thus, FINRA believes that the sponsor of a smaller DPP or REIT can absorb the higher fixed overhead costs owing to the small size of the offering. Finally, the five percent limitation on issuer expenses in the proposed rule change is not new and is consistent with the standards in existing NASD Rule 2810, which was approved by the SEC. *See* e-mail from Gary Goldsholle, Vice President and Associate General Counsel, FINRA, to Michael Hershaft, Special Counsel, Commission (May 7, 2008).

With respect to the letter from R.J. O'Brien, FINRA stated that the comments were beyond the scope of the filing as the proposed rule change does not impose any new requirements with respect to commodity pool trail commissions. The issues raised in this letter were addressed by the SEC in an approval order issued in a prior rulemaking proceeding. *See* Securities Exchange Act Release No. 50335 (Sept. 9, 2004), 69 FR 55855 (Sept. 16, 2004) (SR–NASD–2004–136). *Id.*

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 5, including whether Amendment No. 5 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASD–2005–114 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASD–2005–114. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASD–2005–114 and should be submitted on or before June 4, 2008.

V. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[28] which require, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.[29] The Commission notes that the proposed rule change would codify FINRA's longstanding policy of applying certain regulatory requirements in NASD Rule 2810 to REITs.

The Commission believes that clarifying the standards for determining the fairness and reasonableness of compensation, treating the use and allocation of offering proceeds in a more explicit and objective manner, requiring disclosure regarding the liquidity of prior programs offered by the same sponsor, prohibiting sales loads on reinvested dividends and enabling bona fide training and education meetings to take place at appropriate locations, are measures designed to prevent fraudulent practices, promote just and equitable principles of trade, and protect investors and the public interest.

Accelerated Approval of Amendment No. 5

The Commission finds good cause for approving Amendment No. 5 to the proposed rule change prior to the thirtieth day after the amendment is published for comment in the **Federal Register** pursuant to Section 19(b)(2) of the Act. Amendment No. 5 clarifies several provisions of the proposed rule change, including calculating and allocating compensation, requiring issuer compensation to be included in the cap on organization and offering expenses, and providing greater specificity regarding the prohibition on sales loads on reinvested dividends. The Commission believes that these changes will provide greater clarity with respect to the applicability of and compliance with the proposed rule change, while continuing to protect investors and the public interest. Accordingly, the Commission finds that the accelerated approval of Amendment No. 5 is appropriate.

[28] 15 U.S.C. 78o–3(b)(6).

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

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[30] that the proposed rule change, as amended (SR–NASD–2005–114), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–10704 Filed 5–13–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Release No. 34–57802; File No. SR–FICC–2008–02]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Proposed Rule Change To Require Demand Processing for Blind-Brokered Repo Trades

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on April 9, 2008, the Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by FICC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

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

FICC is seeking to amend the rules of the Government Securities Division (''GSD'') to mandate Demand Comparison submission and processing for blind-brokered repo trades that are submitted by a specified cut-off time.

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

In its filing with the Commission, FICC 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. FICC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[2]

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

1. Background

In 2001, the Government Securities Clearing Corporation (''GSCC''), the GSD's predecessor, redesigned its comparison rules and procedures soon after the introduction of the real-time trade matching system. At that time, GSCC also moved the timing of its settlement guaranty from the point of netting to the point of comparison, which was much earlier in the day. In designing these changes, GSCC's goal was to provide straight through processing by providing for easy identification and resolution of uncompared trades intraday in order to achieve 100 percent comparison. These changes reduced risk by ensuring that more transactions were compared and guaranteed by the clearing corporation earlier in the day so that intraday credit exposure to counterparties was minimized.

As part of the redesign of the GSCC comparison rules, GSCC introduced Demand Comparison, which was a new type of comparison that was created to provide members with flexibility and control over the comparison process for trades executed via intermediaries.[3] Demand Comparison strikes a balance between ''bilateral comparison'' (the traditional form of comparison), where each member is required to submit trade data to the clearing agency in order for the clearing agency to compare the trade, and ''locked-in comparison,'' where the trade is submitted as a compared trade to the clearing agency by one side or by one intermediary.[4]

Demand Comparison entails submission of trade data by approved intermediaries (*e.g.*, brokers) called ''Demand Trade Sources.'' FICC deems a trade submitted for Demand Comparison to be compared upon FICC's receipt of the trade data from the Demand Trade Source. However, if a dealer ''does not know'' a trade submitted on its behalf by a Demand Trade Source, the dealer is able to submit a DK (*i.e.*, ''don't know'') to the GSD. The receipt of a DK by FICC causes the demand comparison trade to no longer be deemed compared. In order to effect comparison for a demand comparison trade that has been DKed, the DK must be removed. If the member that sent the DK determines that it did so erroneously, the member is able to remove the DK so that the trade is compared.[5] Modification of a DKed trade by the Demand Trade Source also removes the DK so that the trade is compared.[6] The removal of the DK and modification of a DKed trade are subject to the prescribed time frames for Demand DK processing.

2. Proposal

FICC's current proposal is to mandate Demand Comparison for all blind-brokered repo trades that are submitted by 4 pm New York time. The GSD's members acting as inter-dealer brokers for repos will be designated as approved Demand Trade Sources. Members on whose behalf the brokers submit trades will not need to separately authorize the brokers as their Demand Trade Sources for GSD's purposes because GSD's rules will do so. After approval of the rule change, counterparties to blind-brokered repo trades will still need to submit their trade data as they do currently. Dealers will need to monitor the broker submissions against them in order to submit DKs where necessary to block any further processing of the submission. In order to provide the dealer counterparties with adequate time by which to submit their DKs, especially for trades submitted close to the 4 p.m. deadline, GSD will create a 30 minute DK window following the 4 p.m. Demand Comparison submission deadline (until 4:30 p.m.) during which time the dealer counterparties can DK previously received demand trades; however, dealer counterparties will be able to submit DKs at any time during the Demand Comparison submission processing time frame. Under Demand Comparison processing, a dealer counterparty that does not submit a DK with respect to a blind-brokered repo trade submitted against it will be responsible for that trade. Blind-brokered repo trades submitted after the 4 pm deadline will be treated as trades submitted for ''bilateral comparison'' requiring two-sided submission and matching for comparison to occur.

[30] 15 U.S.C. 78s(b)(2).

[31] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified the text of the summaries prepared by FICC.

[3] Securities Exchange Act Release No. 44946 (October 17, 2001), 66 FR 53816 [File No. SR–GSCC–2001–01].

[4] A Treasury auction take-down trade is a typical example of a trade submitted for Locked-In Comparison.

[5] Under this proposal to require Demand Comparison processing of blind-brokered repo trades, the cut-off time for removing DKs will be 8 pm New York time.

[6] Under this proposal to require Demand Comparison processing of blind-brokered repo trades, the cut-off time for modifications by Demand Trade Sources will be 8:00 pm New York time.