



## INSTITUTE OF INTERNATIONAL BANKERS

July 22, 2024

Submitted via email

Vanessa A. Countryman, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-0609

**Re: Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Proposed Rule Change to Modify the GSD Rules Relating to the Adoption of a Trade Submission Requirement (SR-FICC-2024-009)**

Dear Ms. Countryman,

The Institute of International Bankers (the “IIB”)<sup>1</sup> appreciates the opportunity to comment on the above-captioned proposed rule (the “Proposed Rule”) submitted by the Fixed Income Clearing Corporation (“FICC”) to implement the Securities and Exchange Commission’s (“Commission”) recently adopted rules that, among other things, require certain repurchase (“repo”) and cash transactions in U.S. Treasury securities to be centrally cleared (“Treasury Clearing Rule”).<sup>2</sup>

As we have previously noted to the Commission,<sup>3</sup> we recognize the risks in the U.S. Treasury securities market and acknowledge that benefits exist to central clearing in certain situations. However, we also expressed concern that the Treasury Clearing Rule could “risk decreasing liquidity if market participants reduce activity or leave the market” if not appropriately calibrated and implemented without fully considering the costs and benefits of an expansive clearing mandate.<sup>4</sup> As we emphasized then, a measured approach “is especially

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<sup>1</sup> The IIB represents the U.S. operations of internationally headquartered financial institutions from more than 35 countries around the world. The membership consists principally of international banks that operate branches, agencies, bank subsidiaries, and broker-dealer subsidiaries in the United States. The IIB works to ensure a level playing field for these institutions, which are an important source of credit for U.S. borrowers and comprise the majority of U.S. primary dealers. This letter is intended to supplement the comments submitted by other industry groups in response to the Proposed Rule.

<sup>2</sup> 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. 2714 (Jan. 16, 2024), available at <https://www.govinfo.gov/content/pkg/FR-2024-01-16/pdf/2023-27860.pdf>.

<sup>3</sup> IIB and SIFMA Comment Letter to 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, 87 Fed. Reg. 64,610 (Oct. 25, 2022), available at [https://cdn.ymaws.com/www.iib.org/resource/resmgr/2022\\_comms/20221222SIFMA.IIBCommentLtr.pdf](https://cdn.ymaws.com/www.iib.org/resource/resmgr/2022_comms/20221222SIFMA.IIBCommentLtr.pdf).

<sup>4</sup> *Id* at 2.

essential in the context of the Treasury market, the main source of funding for the U.S. government and the basis for borrowing costs globally across a wide variety of assets, where any changes could have significant consequences that ripple out to the entire global financial system.”<sup>5</sup> This is particularly true given pending actions by other regulators, including the federal banking regulators with respect to their proposed changes to bank capital rules, that may affect the U.S. Treasury markets and central clearing.<sup>6</sup>

FICC—currently the only registered clearing agency for U.S. Treasury security transactions—should likewise take an appropriately calibrated approach in implementing the Treasury Clearing Rule through its Proposed Rule. In this regard, we are particularly concerned with the Proposed Rule’s extraterritorial scope. Specifically, FICC proposes to modify its existing membership criteria for non-U.S. banks, which allow a foreign bank to establish netting membership through its U.S. branch or agency.<sup>7</sup> Instead, the Proposed Rule would require a foreign bank and its U.S. branch to apply for membership together such that “a branch and its parent bank are considered the same legal entity under the GSD Rules and not separate affiliates” (the “Foreign Bank Membership Rule”).<sup>8</sup>

As detailed below, the proposed Foreign Bank Membership Rule raises a number of serious issues for foreign banks that we do not believe the Commission and FICC have fully considered, and which could result in harm to the U.S. Treasury security markets and the U.S. and global economies more broadly. In particular, while the Commission alluded to the significance of non-U.S. firms to the U.S. Treasury security markets during the Treasury Clearing Rule rulemaking process<sup>9</sup> and explicitly carved out foreign central banks and sovereign entity counterparties from the scope of the clearing mandate,<sup>10</sup> it never engaged in any analysis or discussion of the broader extraterritorial application of the Treasury Clearing Rule to private sector counterparties. Consequently, it is reasonable to assume that the Commission did not properly contemplate the cross-border application of the mandate or evaluate and address the additional challenges that may arise in this context. Thus, the Proposed Rule raises serious

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<sup>5</sup> *Id* at 3-4.

<sup>6</sup> We provided comments to the federal banking regulators regarding their capital and GSIB surcharge proposals, including how they could impact U.S. Treasury markets and central clearing. *See* IIB Comment Letter to Regulatory Capital Rule: Large Banking Organizations and Banking Organizations With Significant Trading Activity, 88 Fed. Reg. 64028 (Jan. 16, 2024), available at [https://cdn.ymaws.com/www.iib.org/resource/resmgr/2024\\_comms/FINAL\\_IIB\\_Capital\\_Comment\\_Le.pdf?bcs-agent-scanner=0c0c9b68-1951-9d41-9c98-e0601d446712](https://cdn.ymaws.com/www.iib.org/resource/resmgr/2024_comms/FINAL_IIB_Capital_Comment_Le.pdf?bcs-agent-scanner=0c0c9b68-1951-9d41-9c98-e0601d446712) (“To the extent that individual banks’, and particularly international banks’, cost-benefit analysis leads to a departure from certain markets, liquidity shocks like those that have been seen in the past 5-10 years, even in typically safe Treasury markets, will likely be more frequent and deeper. This would counteract the significant recent efforts across various government agencies to make the Treasury markets more resilient.”).

<sup>7</sup> FICC, Government Securities Division Rulebook (“GSD Rules”) (June 21, 2024), Rule 2, Section 3(a)(i), available at [https://www.dtcc.com/~media/Files/Downloads/legal/rules/ficc\\_gov\\_rules.pdf](https://www.dtcc.com/~media/Files/Downloads/legal/rules/ficc_gov_rules.pdf) (“Bank Netting Member – A Person shall be eligible to apply to become a Bank Netting Member if it is . . . a bank or trust company established or chartered under the laws of a non-U.S. jurisdiction and participates in the Corporation through its U.S. branch or agency.”).

<sup>8</sup> *See* Proposed Rule at 9.

<sup>9</sup> *See, e.g.*, Treasury Clearing Rule, 89 Fed. Reg. at 2790.

<sup>10</sup> *See Id.* at 2737.

questions about the adequacy of the Commission's and the present rulemaking process. We therefore urge FICC to remove the Foreign Bank Membership Rule from any final rules or to work with the Commission to ensure an appropriate territorial scope limitation to U.S. Treasury security clearing requirements.

### **Discussion**

As noted above, the Foreign Bank Membership Rule would require a foreign bank to apply to FICC to be a netting member as one entity along with its U.S. branch, rather than allowing the U.S. branch to be a netting member on its own, as is possible under current GSD Rules. This proposed change raises a number of serious concerns that the Commission and FICC have not fully considered.

#### **I. The Foreign Bank Membership Rule Could Inappropriately Expand the Clearing Mandate**

The Proposed Rule's U.S. Treasury security clearing mandate, as well as the Commission's Treasury Clearing Rule, apply to certain repo and cash transactions to which a netting member is a counterparty. To the extent that the Foreign Bank Membership Rule would expand the mandate to apply beyond a foreign bank's U.S. branch or agency, as the netting member, to the bank as a whole, worldwide, then it would inappropriately expand the mandate to apply extraterritorially to the transactions between the bank's foreign branches and foreign counterparties, where there is no U.S. nexus.

Such an expansion would have several negative consequences that were not considered by the Commission when finalizing the Treasury Clearing Rule or by FICC when promulgating the Proposed Rule. For example, neither the Treasury Clearing Rule nor the Proposed Rule provides any discussion of whether the GSD Rules are enforceable with respect to transactions entered into by a foreign bank's foreign branches with foreign counterparties under foreign laws. In particular, we are not aware of any analysis from the Commission or FICC regarding whether fundamental requirements, such as netting (including close-out netting in a default scenario) are enforceable in all the relevant jurisdictions. Without legal certainty with respect to these types of issues, the benefits of central clearing cannot be achieved. This concern does not arise with respect to a U.S. branch netting member since such a branch is, by definition, established in the United States and subject to U.S. law and regulation, including the GSD Rules. In this regard, it is curious that FICC refers to the Foreign Bank Membership Rule as a mere "clarif[ication]," implying that this requirement perhaps already exists and does not necessitate explanation or justification.<sup>11</sup> That is simply incorrect based on our members' experience and FICC's own GSD membership directory.<sup>12</sup>

Similar issues would arise with a foreign bank's foreign counterparties. If transacting with a foreign bank having a netting membership required those counterparties to have access to

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<sup>11</sup> See Proposed Rule at 9.

<sup>12</sup> See FICC-GOV Member Directories, available at <https://www.dtcc.com/client-center/ficc-gov-directories> (providing examples of foreign banks with separate memberships for their U.S. branches and, in some cases, the foreign parent bank entities).

FICC, they would likely need to do so indirectly (i.e., through a sponsoring member). However, the Commission and FICC have not considered whether sponsoring members would or could accept foreign counterparties from every relevant foreign jurisdiction as sponsored members, including as a result of the legal enforceability concerns noted above.<sup>13</sup> Sponsoring trades for foreign clients also could raise questions under non-U.S. law, including, for example, whether doing so could require the sponsoring member to register as a broker in those jurisdictions. Without further analysis, the Commission cannot be sure whether the Foreign Bank Membership Rule would, contrary to its aims, inhibit access to clearing.

As another example, FICC does not currently operate on a 24-hour basis.<sup>14</sup> While the Commission decided not to address this limitation through a clearing exception for aftermarket trading, it based its decision on an empirical analysis of transactions already cleared by FICC as well as certain conventions in the U.S. domestic repo market.<sup>15</sup> However, that analysis is inapposite to bilateral repos conducted outside the United States. If a foreign bank located in Singapore becomes a netting member and, therefore, must clear all of its repo transactions, how could it do so in a prompt and accurate manner,<sup>16</sup> and in compliance with the Treasury Clearing Rule and FICC's current operational status, for a transaction out of Singapore with a Singaporean counterparty? At a minimum, FICC or the Commission would need to clarify the timeframe in which these transactions must be submitted for clearing and weigh the benefits of requiring an overnight transaction to be cleared if it cannot be submitted until halfway through its term when FICC opens. Moreover, an almost unlimited mandate to clear foreign banks' foreign branch transactions would bring in scope non-U.S. counterparties that are transacting only locally, that are unlikely to be familiar with the evolving conventions of the U.S. domestic repo market, and are, therefore, far less likely to sign onto documentation with their counterparties (e.g., the foreign banks and FICC sponsoring members) that, in their domestic market, is wholly novel, not explained by a local law requirement, and burdensome.

All of these issues could lead foreign counterparties to question their participation in the U.S. Treasury security market when they have alternative government bond markets in which they could invest without raising these issues or more generally incurring the costs of central clearing. A shift by foreign investors away from U.S. Treasuries to, for example, European or

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<sup>13</sup> FICC's heavily caveated list of approved jurisdictions for Sponsored Members is relatively limited in scope and certainly is not broad enough to cover every jurisdiction where a foreign bank's foreign clients might be located. *See* Jurisdictions Approved by FICC for Sponsored Members (July 17, 2024), available at <https://www.dtcc.com/-/media/Files/Downloads/Clearing-Services/Approved-FICC-Jurisdictions-for-Sponsored-Members.pdf> ("This list is provided for information purposes only. It is based on legal advice obtained for the sole benefit of FICC without any specific consideration of the circumstances of any Sponsored Members. The legal analysis of any jurisdiction depends on a number of factors, including the number of existing Sponsored Members located in a jurisdiction and the type of legal entity of the Sponsored Member applicant.").

<sup>14</sup> *See, e.g.*, GSD Rules (Schedule of Timeframes).

<sup>15</sup> *See* Treasury Clearing Rule, 89 Fed. Reg. at 2740-41.

<sup>16</sup> *See Id.* at 2715 (citing the Government Securities Act of 1986, 15 U.S.C. § 78c(a)(12)(B)(i)); *see also* Proposed Rule at 25.

Asian sovereign bonds could materially increase the U.S. government’s borrowing costs and impair overall U.S. Treasury security market liquidity and resiliency.<sup>17</sup>

Reduced counterparty interest in the Treasury market, along with the costs of clearing, legal enforceability, and operational/time zone issues described above, could also lead some foreign banks to question the costs and benefits of continuing to participate in FICC as netting members, given that withdrawal from FICC would eliminate any extraterritorial application of the clearing mandate.<sup>18</sup> That result would be contrary to one the Commission’s core goals in promulgating the Treasury Clearing Rule, which was to expand access to clearing, including through facilitating direct membership at clearing agencies.<sup>19</sup> Market participants that access FICC indirectly (i.e., through a sponsoring member), including foreign banks but also other firms, would also be harmed through a reduction in their choice of potential sponsoring members, which could also result in increased costs to access clearing. Reduced participation and liquidity in FICC-cleared repos could also impact the secured overnight financing rate (“SOFR”), the calculation of which depends on those repos. Innumerable market participants now rely on SOFR as a benchmark interest rate for their transactions. The U.S. government, including the Commission,<sup>20</sup> has spent years promoting the transition to, and use of, SOFR as a benchmark—implementation of the Foreign Bank Membership Rule could hinder those efforts.

Given the lack of analysis, we have serious concerns as to whether the potentially significant costs of the Foreign Bank Membership Rule were appropriately considered by the Commission and FICC. We are also concerned that the Commission may not have adequately considered whether it even has the authority to impose the Treasury Clearing Rule’s requirements on foreign banks in the manner envisioned by the Proposed Rule. While we do not dispute that the Commission may apply the Treasury Clearing Rule to the U.S. branches of foreign banks and FICC may set membership rules for those branches given the requisite nexus to the United States, it is not at all clear that the Commission’s jurisdiction likewise extends to the foreign parent bank entities organized and regulated outside the United States. In this regard, we note that mandatory clearing rules in other markets, including for U.S. dollar interest rate swaps (including SOFR swaps), do not extend to a foreign bank’s foreign branches when trading with foreign counterparties;<sup>21</sup> there is no justification for taking a broader approach here.

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<sup>17</sup> A substantial number of the primary dealers are foreign banks or their U.S. branches or affiliates. See Federal Reserve Bank of New York, Primary Dealers available at <https://www.newyorkfed.org/markets/primarydealers#primary-dealers>.

<sup>18</sup> The Treasury Clearing Rule’s exemption for interaffiliate repos does little to assuage these concerns, given the requirement for the direct FICC participant’s affiliate to clear all other repos in order to rely on the exemption and the exemption’s limitation to affiliates that are banks, broker-dealers, or futures commission merchants (or foreign equivalents). See Treasury Clearing Proposal, 89 Fed. Reg. at 2736-8.

<sup>19</sup> *Id.* at 2755-6.

<sup>20</sup> See, e.g., Commission Staff Statement on LIBOR Transition—Key Considerations for Market Participants (Dec. 7, 2021), available at <https://www.sec.gov/newsroom/speeches-statements/staff-statement-libor-transition-20211207>.

<sup>21</sup> CFTC, Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45292, 45369 (July, 26, 2013), available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2013-17958a.pdf>.

## II. The Foreign Bank Membership Rule Raises Issues for the Scope of Other Aspects of the GSD and Proposed Rules

To the extent that the Foreign Bank Membership Rule extends FICC’s other membership rules (as set out in the GSD Rules and the Proposed Rule) to a foreign bank’s global operations, then it raises additional issues with respect to those rules.

For example, the Proposed Rule would require netting members to authorize FICC to request information from the netting member’s “Designated Examining Authority” or “Appropriate Regulatory Agency” regarding that member “as may be available to be shared”.<sup>22</sup> The Proposed Rule also reiterates the requirement for a member that is a “Foreign Person”<sup>23</sup> to submit concurrently with its submission to the relevant regulator or similar authority copies of *any* regulatory notifications required to be made when an entity does not comply with the financial reporting and responsibility standards set by their home country regulator (without the “as may be available to be shared” proviso).<sup>24</sup> Certain foreign regulators may prohibit or otherwise condition the sharing of regulatory information regarding their registrants with FICC. A foreign bank’s inability to comply with these requirements could prevent it from attaining or maintaining netting membership. The Proposed Rule also would require certain attestations and audits concerning compliance with clearing requirements, but it does not address whether the attestation must be made by a global chief compliance officer versus a U.S. officer or whether an independent internal audit function must report to the global board of directors or a local governing body.<sup>25</sup>

Compliance with other aspects of the GSD Rules could prove challenging as well. For example, under Rule 3, Section 7 of the GSD Rules, FICC may require a member to provide additional reporting of its financial and operational condition at FICC’s discretion.<sup>26</sup> Another change to Rule 3 would, for example, require a member, at FICC’s discretion, to submit annual audited financial statements for a member’s *affiliate*, including an affiliate that is a *non-U.S.* organized entity, and leaving it to FICC’s “sole discretion” whether to accept unaudited financial statements if audited ones are not available.<sup>27</sup> Application of these rules to foreign banks and their worldwide affiliates (rather than just their U.S. branches and affiliates) would greatly expand the potential universe of reportable information, which could significantly increase compliance costs for the banks while also potentially saddling FICC with a significant amount of irrelevant information.

These examples reflect some of the most notable questions and issues that would arise from global application of FICC’s GSD Rules to foreign banks, but, given the highly abbreviated comment period for the Proposed Rule, there may be others. At a minimum, FICC must fully

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<sup>22</sup> See Proposed Rule at 129; GSD Rules at Rule 1 (defining Designated Examining Authority and Appropriate Regulatory Agency).

<sup>23</sup> GSD Rules at Rule 1 (defining Foreign Person).

<sup>24</sup> See Proposed Rule at 111.

<sup>25</sup> See *Id.* at 13-14.

<sup>26</sup> *Id.*; GSD Rules at Rule 3, Section 7.

<sup>27</sup> Proposed Rule at 20.

consider whether each of its GSD Rules is appropriate to apply to a foreign bank outside the United States, and, if so, how to do so given varying local laws and governance structures.

### **III. The Foreign Bank Membership Criteria Should Not Be Implemented**

For the reasons noted above, the Foreign Bank Membership Rule should be removed from any final FICC rule. We believe the simplest way to do so would be for FICC to revise its Proposed Rule to continue to permit a foreign bank's netting membership to be limited to its U.S. branch. To the extent FICC cannot do so or doing so is undesirable for some other reason, FICC must evaluate how to tailor its membership rules to address the issues described above and work with the Commission to ensure an appropriate territorial scope limitation to U.S. Treasury security clearing requirements.

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We appreciate the opportunity to provide our views on the Proposed Rule. If you have any questions, or would like to discuss these comments further, please reach out to Stephanie Webster at [swebster@iib.org](mailto:swebster@iib.org) or 646-213-1149.

Respectfully submitted,

/s/ 

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