

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-52922; File Nos. SR-DTC-2005-16, SR-FICC-2005-19, and SR-NSCC-2005-14)

December 7, 2005

Self-Regulatory Organizations; The Depository Trust Company, Fixed Income Clearing Corporation, and National Securities Clearing Corporation; Order Approving Proposed Rule Changes to Require Members to Purchase Shares of the Common Stock of The Depository Trust & Clearing Corporation

I. Introduction

On October 4, 2005, The Depository Trust Company (“DTC”), the Fixed Income Clearing Corporation (“FICC”), and the National Securities Clearing Corporation filed with the Securities and Exchange Commission (“Commission”) proposed rule changes SR-DTC-2005-16, SR-FICC-2005-19, and SR-NSCC-2005-14 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”).¹ Notices of the proposals were published in the Federal Register on October 31, 2005.² The Commission received one comment letter in response to the proposed rule change filed by DTC³ and one comment letter in response to the proposed rule change filed by FICC.⁴ For the reasons discussed below, the Commission is approving the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² Securities Exchange Act Release Nos. 52665 (October 25, 2005), 70 FR 62357 [SR-DTC-2005-16]; 52663 (October 25, 2005), 70 FR 62359 [SR-FICC-2005-19]; and 52664 (October 25, 2005), 70 FR 62364 [SR-NSCC-2005-14].

³ Letter from Stewart A. Levin, Ph.D., Geophysics Research Fellow, Landmark Graphics Corp. (Oct. 29, 2005).

⁴ Letter from Kelly S. McEntire, Retired State of Utah Administrator, (Dec. 6, 2005).

II. Description

The Depository Trust & Clearing Corporation (“DTCC”) is a holding company parent of DTC, FICC, and NSCC. Pursuant to DTCC’s current Shareholders Agreement (“Shareholders Agreement”), substantially all members and participants of DTC, FICC, and NSCC (collectively “Participants”) are entitled but are not required to purchase DTCC common shares. Participants are allocated an entitlement to purchase DTCC common shares on the basis of their relative use of the services of DTC, FICC, and NSCC. As of the last periodic allocation of share entitlements in 2003, approximately 1,100 Participants had a right to purchase DTCC common shares; however, only 190 Participants currently own any DTCC common shares and of these only 86 own DTCC common shares up to the full amounts of their share entitlements.

DTCC has obtained the consent of its common shareholders to amend the Shareholders Agreement pursuant to which Participants of DTC, FICC, and NSCC that make full use of the services of one or more of these clearing agency subsidiaries of DTCC would be required to purchase DTCC common shares (“Mandatory Purchaser Participants”)⁵ in accordance with the terms of the amended Shareholders Agreement while preserving the right but not the obligation

⁵ Pursuant to the amendments to the Shareholders Agreement, a Mandatory Purchaser Participant that is a Participant in more than one clearing agency will be required to purchase DTCC common shares based upon its relative use of the services of all clearing agencies of which it is a Participant. For DTC, a Mandatory Purchaser Participant includes all participants of DTC other than Limited Participants. For FICC, this term includes Netting Members of FICC’s Government Securities Division. For NSCC, this term includes all Members other than Mutual Fund/Insurance Services Members.

of other Participants that make only limited use of the services of one or more of the clearing agencies to purchase DTCC common shares (“Voluntary Purchaser Participants”).⁶

Holders of DTCC common shares are entitled to elect all of the directors of DTCC other than two directors that DTCC preferred shareholders are entitled to elect.⁷ DTCC common shareholders are entitled to vote on all other matters submitted to a vote of DTCC shareholders, and each DTCC common shareholder is entitled to one vote per DTCC common share. DTCC common shareholders are entitled to cumulative voting in the election of directors. In addition, DTCC common shareholders are entitled to receive out of the assets of DTCC, when and if declared by the Board of Directors of DTCC, dividends payable in cash or stock or otherwise. However, since DTC, FICC, and NSCC provide their services to their Participants on a cost-basis with revenues in excess of expenses and necessary reserves rebated or provide their services on a discounted basis, as a matter of policy and practice DTCC does not pay any dividends on DTCC common shares. The amendments to the Shareholders Agreement will have no effect on these rights of DTCC common shareholders and preferred shareholders.

⁶ The DTCC Shareholders Agreement marked to show the proposed amendments is attached to the proposed rule change as Exhibit 3 and is available on DTC’s Web site at <http://www.dtc.org/impNtc/mor/index.html>, FICC’s Web site at <http://www.ficc.com/gov/gov.docs.jsp?NS-query=>, and NSCC’s Web site at www.nsc.com/legal.

⁷ In connection with the 1999 integration of DTC and NSCC and formation of DTCC, the New York Stock Exchange (“NYSE”) and the National Association of Securities Dealers (“NASD”), the then coowners of NSCC, each received 10,000 DTCC preferred shares in exchange for their NSCC common stock. DTCC preferred shareholders have no right to vote on any matters submitted to a vote of DTCC shareholders except that each of the two DTCC preferred shareholders are entitled to elect one director. DTCC preferred shareholders have no right to receive any dividends. In the event of any liquidation, dissolution or winding up of the affairs of DTCC, DTCC preferred shareholders are entitled to a liquidation preference of \$300 per share of DTCC preferred stock.

Pursuant to certain covenants in the Shareholders Agreement, a person elected as a director of DTCC also serves as a director of DTC, FICC, and NSCC. The amendments to the Shareholders Agreement will have no effect on these covenants.

The system for allocating entitlements to purchase shares in the Shareholders Agreement was first implemented by DTC with respect to DTC common shares in 1973. At that time, the bank users of DTC's services purchased their DTC common shares, but for logistical and other reasons the NYSE, the NASD, and the American Stock Exchange ("AMEX") (collectively "Self-Regulatory Organizations") purchased the DTC common shares allocated to the broker-dealer users of DTC services that were their members. It was anticipated that over time as broker-dealers exercised their right to purchase DTC common shares, the number of DTC common shares held by broker-dealers directly would increase, and the number of DTC common shares held by the Self-Regulatory Organizations would correspondingly decrease, potentially to zero, since the share entitlements of the Self-Regulatory Organizations were a function of the unexercised share entitlements of their members.

Notwithstanding the passage of time and the opportunity afforded broker-dealer Participants to purchase DTCC common shares, the Self-Regulatory Organizations continue to hold a significant block of DTCC common shares. NYSE holds approximately 29% of the outstanding DTCC common shares, and the NASD and the AMEX each holds approximately 3.7%. It is also the case that a significant number of Participants other than broker-dealers have not purchased any DTCC common shares or have not purchased DTCC common shares commensurate with their share entitlements. Accordingly, a total of approximately 36.4% of the outstanding DTCC common shares are not held by Participants but rather are held by the Self-Regulatory Organizations. Ownership of DTCC common shares (and previously ownership of

DTC common shares) is not a financial investment but instead is a vehicle for supporting each registered clearing agency and influencing its policies and operations through the election of directors.

By providing that all DTCC common shares are owned by Participants, DTC, FICC, and NSCC believe that the proposed rule changes⁸ and the proposed amendments to the Shareholders Agreement will guarantee that Participants continue to govern and to control the activities of DTC, FICC, and NSCC, including the services provided and the service fees charged. In particular, Participants will be in a position to assure that DTC, FICC, and NSCC continue the practices of establishing fees that are cost-based and use-based and of returning to Participants in the form of cash rebates or discounts revenues in excess of expenses and necessary reserves. Finally, because they introduce the greatest risks to the clearing agencies and obtain the greatest benefits from clearing agency services, it is appropriate to require those Participants making full use of the services of DTC, FICC, and NSCC to contribute to DTCC's capital through the purchase of its common shares.

III. Comment Letters

The Commission received two comment letters.⁹ Both commenters opposed the proposed rule change. One commenter stated that if DTC needed to raise capital it should offer the shares to the general public or participants in DTC's Direct Registration System. The commenter also suggested that share ownership by DTC participants provides a financial

⁸ The proposals add a new provision to each of DTC, FICC, and NSCC's rules that requires Mandatory Purchaser Participants to purchase and own DTCC common shares in accordance with the terms of the Shareholders Agreement. The new provisions are DTC Rule 31, NSCC Rule 64, FICC's Government Securities Division Rule 49, and FICC's Mortgage-Backed Securities Division Article V, Rule 18.

⁹ Supra notes 3 and 4.

disincentive for such participants to share information with the Commission and other regulators regarding criminal or unethical practices. The other commentator suggested that requiring participants to purchase common shares in DTCC could be used as a means to separate small investors from large investors based on their net assets and subject smaller investors to potential abuse.

IV. Discussion

Section 17A(b)(3)(C) of the Act requires that the rules of a clearing agency be designed to assure fair representation in the selection of its directors and the administration of its affairs.¹⁰ The Commission finds that DTC, FICC, and NSCC's proposed rule changes are consistent with this requirement because the proposed changes serve to increase the number of Participants that have input in the selection of DTCC's board of directors and thus the boards of directors of DTC, FICC, and NSCC. This increased participation of Participants should help DTC, FICC, and NSCC assure that their Participants have fair representation in the selection of its directors and the administration of their affairs.

The purpose of the proposed rule changes are not to raise capital for DTC, FICC, and NSCC as suggested by one of the commenters, but rather to redistribute common share ownership from having a significant portion held by the Self-Regulatory Organizations to having all shares held by the Participants in order to increase Participants' role in the selection of directors and the administration of DTC, FICC, and NSCC's affairs. With respect to the other commenter's fear that some "investors" would not be able to purchase DTCC common shares, neither DTC, FICC, nor NSCC have been informed by any of their Participants that they would have difficulty or be unable to pay for the allocation of shares.

¹⁰ 15 U.S.C. 78q-1(b)(3)(C).

V. Conclusion

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

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹¹ that the proposed rule changes (File Nos. SR-DTC-2005-16, SR-FICC-2005-19, and SR-NSCC-2005-14) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.¹²

Jonathan G. Katz
Secretary

¹¹ 15 U.S.C. 78s(b)(2).

¹² 17 CFR 200.30-3(a)(12).